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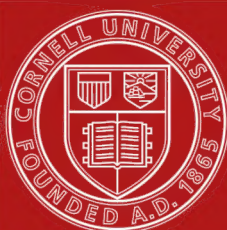
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A treatise on the law of trespass in the



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A TREATISE
ON THE
LAW OF TRESPASS
IN THE
TWO FOLD ASPECT
OF
THE WRONG AND THE REMEDY.

By ^{Tney} THOMAS W. WATERMAN,
COUNSELLOR AT LAW.

IN TWO VOLUMES.

VOLUME I.

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P R E F A C E .

THE accumulation of legal decisions has naturally led to the multiplication of treatises on special subjects of the law, until the treatment in separate works of at least the more prominent topics has gradually come to be regarded not only as a very great convenience, but an absolute necessity. —

Among the invasions of private right, trespass is conspicuous for frequency of occurrence and universality of application. The variety of important questions arising from it is shown by the numerous reported cases dating from the earliest period, and continuing uninterruptedly to the present time. The desirability of the separate and independent consideration of a subject which is at the same time so practical and so extensive, is apparent. But strange to say, this fruitful field has hitherto not been explored by any legal writer excepting in connection with, and as a branch of, some other general topic.

The following pages, designed to supply a want which every member of the bar in active practice must have more or less felt, are the result of several years of diligent labor. The plan adopted by the author at the outset, to which he steadily adhered, necessarily involved protracted toil. It was, to eschew, with few exceptions, all books of reference but law reports ; to aim at the careful reading of every reported decision ; and finally, to adopt his conclusions only after a systematic and patient study and comparison of the cases, commencing with the earliest adjudications, and following the stream of judicial exposition down to the latest. The extent of his researches, which however inadequately performed have been conscientiously prosecuted, will appear from the number of citations.

The work, which is in two volumes, consists of four books : 1st. *Trespass in general* ; 2d. *Trespass to the person* ; 3d. *Trespass in relation to personal property* ; and 4th. *Trespass on real estate*. The scope of these several books, which as a whole are intended to embrace every species of trespass known to the law, is sufficiently indicated by their titles. As there is a full analysis of each chapter,

and the text is divided into sections which are interchangeably referred to, it is hoped that the facilities for investigation will be found ample. Volume one being mainly devoted to trespass to the person and personal property, and volume two exclusively to trespass on real estate, it seemed proper and desirable that each volume, presenting as it does questions which in a certain sense are wholly distinct, should be rendered complete in itself, and each has accordingly been supplied with a full index, table of contents, and table of cases.

With regard to the treatment of the subject, it may be observed, that legal propositions are seldom left for support to the mere citation of authorities, but are generally enforced and illustrated by examples, which enables the reader to judge how far the decisions sustain the inferences sought to be derived from them. In the statement of cases as much brevity has been employed as seemed consistent with a full understanding of the points discussed; a concise narrative of facts being first given, and then the substance of the decision. Additional examples in further illustration of the text, and also the details of some of the more important cases, will be found in the notes. The citations have been carefully verified.

The author submits the result of his labors to the indulgent consideration of his legal brethren.

BINGHAMTON, N. Y., March, 1875.

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BOOK I.

TRESPASS IN GENERAL.

CHAPTER I.

DEFINITION AND NATURE OF TRESPASS.

1. Trespass defined.
2. Acts which may or may not constitute trespass.
3. Infringement of right without specific injury.
4. Motive or intention.
5. Liability for consequences of wrongful act.
6. Inciting or aiding the commission of trespass.
7. Ratification and adoption of wrongful act.
8. Indemnity of innocent wrong-doer.

1. *Trespass defined.*

§ 1. Trespass, in its broader sense, signifies the voluntary transgression of any divine law or command ;—the violation of any rule of rectitude to the injury of another. Literally, it means to pass beyond ; hence, to enter unlawfully upon the land of another.¹ In its usual legal acceptance, it is a wrong done with force, to the absolute rights of personal liberty and security, and to those of property corporeal. It sometimes includes injuries to the relative rights of persons ; as beating, wounding, or imprisoning a wife or servant.²

§ 2. Trespass is also the name of an action for the recovery of damages for a wrong committed with immediate force, as distinguished from trespass on the case which lies where the injury is consequential, and not committed with direct

¹ Webster's Dict.
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² Bouv. L. Dict.

force.¹* The force may be actual, as by an attack; or implied, as by a wrongful, though peaceable entry on land.²

2. *Acts which may or may not constitute trespass.*

§ 3. Mere words cannot constitute a trespass.³ But words or acts of provocation may have the effect of a breach of the peace when they tend immediately thereto.⁴ And proof of the language of the defendant, while committing a trespass, is proper to qualify the act, and to show with what spirit it is done.⁵ We shall hereafter have occasion to show the important bearing which words often have in determining the character of the alleged wrong. A single example must suffice for the present. In *Merest v. Harvey*,⁶ the defendant, in trespassing upon the plaintiff's land, used very intemperate language, threatening, in his capacity of magistrate, to commit the plaintiff, and defying him to bring an action. The witnesses described his conduct as being that of a drunken or insane person. The plaintiff behaved with coolness and propriety. A verdict having been found for the plaintiff for 500*l.*, which was the whole amount of damages claimed in the declaration, the court refused, on motion, to set it aside for excess.

§ 4. If a person entirely deprived of the command of his actions causes an injury, he is not accountable therefor. As if, from motives of self-preservation, he should jump out of the window of a house on fire and fall against another; or if, in endeavoring to save another from inevitable destruction, he should run against some one; or if he were deprived of all control over his will by idiocy or insanity, and should injure

¹ *Ibid.*; *Dale Manf. Co. v. Grant*, 34 N. J. 142.

² *Broom's Com. on Com. L.* 4th ed. p. 125.

³ *Wheeler v. Moore*, Wright's R. 408; *post*, § 145.

⁴ *Boyleston v. Kerr*, 2 Daly, 220.

⁵ *Adams v. Rivers*, 11 Barb. 390.

⁶ 5 Taunt. 442.

* In Delaware, the revised code, 379, abolishes the common law distinction between trespass and trespass on the case, in respect to the question whether the injury complained of is immediate or consequential (*Bailey v. Wiggins*, 1 Houston, 299). See *post*, § 71, *note*.

another, it would be deemed an involuntary trespass, for which no recovery could be had.¹ But where it is claimed that there was a necessity for an act which would otherwise be illegal, it must, of course, be proved that such necessity existed at the time, and that every possible care was taken to avoid the doing of injury.²

§ 5. The grounds of exemption from liability are not confined to the extreme cases we have mentioned; but are equally applicable to every instance of unavoidable accident in the prosecution of a lawful act, where no blame is imputable to the person doing the injury.³ In *Goodman v. Taylor*,⁴ which was an action of trespass for an injury done to a horse by a pony and chaise running against it, it was proved, on the part of the defendant, that his wife was holding the pony by the bridle, when a punch and judy show came by and frightened the pony, which ran off with the chaise. It was held that, if true, this was a good defense. The same was held in an action by a gas company, for injury to their lamp-posts set up along the streets of a city; it being proved that the defendant was driving with proper care, and that the injury was caused by the crowded, slippery, and uneven condition of the street.⁵ *

§ 6. Unavoidable accident, in legal phraseology, does

¹ *Vincent v. Stinehour*, 7 Vt. 62; but see *Gates v. Miles*, 3 Conn. 64.

² *Burton v. McClellan*, 2 Scam. 434.

³ *Com. Dig. Battery, A*; *Davis v. Saunders*, 2 Chit. R. 639; *Brown v. Kendall*, 6 Cush. 292.

⁴ 5 Car. & P. 410; and see *Gibbons v. Pepper*, 4 Mod. 405.

⁵ *Roche v. Milwaukee Gas Co.* 5 Wis. 55.

* In *Roche v. Milwaukee Gas Co.*, *supra*, the court alluded to another circumstance in favor of the defendant, which was, that he was a mere passenger in the wagon, having no interest whatever in it, or in the horse, and neither aiding nor in any manner consenting to the occurrence.

In *Weaver v. Ward*, Hob. 134, which was an action for assault and battery, the defendant pleaded that he was a soldier, that he and the plaintiff were under one captain, and that in mustering he discharged his gun, which *casualiter, et per infortunium, et contra voluntatem suam*, did hurt the plaintiff. It was held that if the defendant had pleaded that he could not have avoided it, or that the plaintiff had run across the gun when it was discharged, or had set forth the circumstances, so that it might appear to the court to be inevitable, such a plea would have been a sufficient justification.

not mean an accident which it was physically impossible, in the nature of things, for the defendant to have prevented. All that is meant is, that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise.¹ In *Vincent v. Stinehour*,² which was an action for trespass for driving against and over the plaintiff with a horse and carriage, the following instructions to the jury, in the court below, were held correct: "Every man in pursuing his lawful business, must use the prudence of the most prudent kind of men; and if there was any want of the exercise of this prudence on the part of the defendant, either in using an unsafe horse, or in the manner of driving and using the horse, whereby the event happened, the defendant must be answerable, and the jury will assess the damages; but if the jury are convinced that there was no such neglect or want of prudence, but that it was the result of unavoidable accident on the part of the defendant, they will find for the defendant." The rule was well illustrated in *Wakeman v. Robinson*.³ The defendant's horse was young and spirited, and he drove him without a curb, in consequence of which he was less easily managed; in that, there was negligence. The defendant, in his alarm, pulled the wrong rein; in that, there was want of skill. On either, or both these grounds, the defendant was liable for the consequences. But if his horse had been properly harnessed and skilfully managed, and the accident to the plaintiff had still occurred, it would have been held inevitable; although the defendant had the physical power to have guarded against it, either by entirely stopping his horse the moment he saw the plaintiff's wagon, or by driving at a very slow and moderate pace. But this is a degree of caution which the law does not exact.*

¹ *Dyger v. Bradley*, 8 Wend. 469.

² 7 Vt. 62.

³ 1 Bing. 213.

* Neither the highway officers of the towns, nor the directors of plank-road companies, are required to grade the whole space within the limits of the highway, so that a traveler can safely drive his carriage over every part of it. In ordinary cases, if they provide a pathway for carriages of suitable width, and so

§ 7. If any blame be imputable to the defendant, though he did not mean to injure the plaintiff, or any other person, he is liable for the damages sustained, as in the case of the accidental discharge of a gun which a person has in his hand,¹ a great degree of care being demanded in the use of of such a weapon; or the falling against a stove, and thereby causing hot water to scald another, by a person who is intoxicated.² *

define it as that there shall be no reasonable danger of its being mistaken, they will not be in fault if a traveler chooses to try an experiment upon the part which is not thus prepared for traveling. Where a road is so constructed or altered, as to present at one point two paths, both of which exhibit the appearance of having been used by travelers, and one of them leads to a dangerous precipice, while the other is quite safe, it is the duty of those having charge of the road to indicate in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided; and if it cannot be otherwise done, to put up such an obstruction as will turn the traveler from the wrong track (*Johnson v. Whitefield*, 6 Shepl. 286; *Packard v. Packard*, 16 Pick. 191; *Shepardson v. Inhabs. of Colerain*, 13 Metc. 55; *Rice v. The Town of Montpelier*, 19 Vt. 470; *Ireland agst. Oswego, Hannibal and Sterling Plank R. Co.* 13 N. Y. 526).

"I am bound to have the approach to my house sufficient for all visitors on business or otherwise. But if a crowd gathers upon it to witness a passing parade, and it breaks down, though it may be shown not to have been sufficient even for its ordinary use, I am not liable to one of the crowd. I owe no duty to him. If a traveler by foot, on the open track of a railroad crosses a bridge, which ought to be, but is not, in its ordinary use, strong enough to bear a locomotive and train of cars, and a decayed board breaks down under him, the company are not liable to him, for they owe him no duty" (*Sharswood, J., in Gillis v. Pennsylv. R. R. Co.* 59 Penn. St. R. 129).

In *Phila. and Reading R. R. Co. v. Hummell*, 44 Penn. St. R. 375, the plaintiff below was a boy of tender years to whom no contributory negligence could be imputed. He was on the track of a railroad, not at a crossing. It was held that the railroad company as to persons so on the track, were not bound to give any warning at starting. Strong, J., remarked that there was "as perfect a duty to guard against an accidental injury to a night intruder into one's bed chamber, as there is to look out for trespassers upon a railroad, where the public has no right to be."

¹ *Morgan v. Cox*, 22 Mo. 373; *Gennings v. Fundeburg*, 4 McCord, 161.

² *Sullivan v. Murphy*, 2 Miles, 298.

* *Gates agst. Miles*, 3 Conn. 64, was an action of trespass for injuring the plaintiff's sloop by running into her with another vessel. It appeared that the defendant was proceeding with the sloop *Susan* through Long Island Sound to New Haven, and that the plaintiff was navigating the sloop *Mary*, in an opposite direction, to New York. When distant from each other about thirty rods, the defendant commanded the man at the helm of the *Susan* to *luff*; in obedience to which the helmsman suddenly luffed and turned the *Susan* to windward, and in consequence of the direction thus given, she directly struck the larboard quarter of the *Mary* with great violence, and caused the injury for which the action was brought. It was held that trespass was the proper remedy, whether the act complained of was wilful or resulted from want of skill and care. A verdict having been directed for the defendant in the court below, on the ground that the plaintiff, in bringing an action on the case, had misconceived his remedy, the Supreme Court, in denying a motion for a new trial, said: "If it had appeared

§ 8. If a person commit a voluntary act which he is under no obligation to do, he is liable for any injury that

that the winds and waves baffled the defendant's purpose, and counteracted his efforts, the motion would have presented a case very different from the one before the court. On this subject there is a total silence; and had a fact so important been made to appear, it would not have been omitted in the statement made for the purpose of reviewing the former decision. The damage then was effected by a stroke from the Susan; the immediate result of force originally and unintermittingly applied by the defendant. Exclude from consideration the possible effect of the winds and waves, and bear constantly in mind that the elements neither counteracted the exertions of the defendant, nor operated otherwise than in entire subserviency to his will, and what is the result?—that the helm and the sails, the winds and the waves, were all his instruments obedient to his wishes, and that the Susan was directed by him in the course which he thought most eligible. From the moment the helm, by the defendant's direction, turned the Susan into that path in which the injury was accomplished, there was no intermediate agent which varied the course intentionally pursued. Were it said that a person turned his horse, and, in pursuance of the direction given, ran over a child and broke his arm, there would exist no doubt whether the damage was imputable to his act. If the misfortune resulted from the impracticability of controlling the horse, it would change the nature of the case. On these facts I am extremely clear that the only legal remedy is trespass *vi et armis*." Chapman, J., *dissenting*.

Dyger v. Bradley, 8 Wend. 469, was an action of trespass against the master of a canal-boat for running his boat against the boat of the plaintiff, whereby the side of the plaintiff's boat was broken in, and goods on board damaged. The plaintiff's boat was lying to, on the heel-path side of the canal. The boat of the defendant was a large lake-boat, and heavily laden. It appeared that although the canal was not quite as wide where the plaintiff's boat lay as it was some distance below, yet that several boats had passed her while in that place. It was proved that there was not room for the boat of the defendant to pass that of the plaintiff at the place where it lay, with the depth of water then in the canal; but that neither the plaintiff nor defendant was aware of that fact. At the trial at the circuit, the judge charged that the plaintiff, when he stopped his boat upon the canal, was bound to select, as his station, a safe place, and such an one as would admit the passage of other boats, and if he selected a hazardous one, and an injury was sustained by him in consequence of his exposed station, he must bear the loss; that if the jury believed that the defendant had been guilty of negligence, or that he intended to run his boat against the plaintiff's, they should find for the plaintiff; but that if the defendant, in endeavoring to pass, managed his boat in a skilful manner, and the injury arose from the exposed situation of the plaintiff, or from mere accident, then they ought to find for the defendant. A verdict having been found for the defendant, a new trial was granted, because the circuit judge, in his charge, excluded from the consideration of the jury, or, at all events, omitted to present to them, the question whether the defendant was not bound to know, under all the circumstances of the case, that his boat could not pass without hazard, and, if he was, whether he ought not to have proceeded more cautiously. Sutherland, J., in delivering the opinion of the Supreme Court, said: "No actual fault seems to be imputable to the defendant, and if he is to be held responsible, it must be on the ground that the accident was not inevitable, inasmuch as the power by which the boat was propelled was entirely under his control, and he was bound to know or ascertain whether he could pass with safety before he made the attempt. The liability of the defendant, in the case at bar, appears to me to depend upon the question whether he was not bound to know that from the state of the water in the canal at that time, and from the size of his boat, and her being heavily laden, he could not pass the plaintiff's boat without hazard; if so, it was his

may happen to another, even through accident. The cases of a man turning round and knocking down another whom he did not see, and the shooting of an arrow at a mark, which glanced, are of this class; the acts being purely voluntary.¹

Where a master directed his servant to lay some rubbish near his neighbor's wall, but so that it might not touch the wall, and the servant exercised ordinary care in obeying the orders of his master, but some of the rubbish fell against the wall, it was held that the master was liable as a trespasser.²

A., with B.'s consent, cut wood on B.'s land, and left it lying there, and B., in order to clear up another part of his land, and with no intention of burning A.'s wood, set fire to some brush, and the fire escaped from B.'s control and ran on to the land where the wood of A. was, and consumed it. It was held that an action of trespass might be maintained by A. against B. for the injury.³ *

duty, either not to have made the attempt to pass, or to have proceeded so slowly and cautiously that no injury could have been produced from the collision. The defendant had the entire control of the speed of his boat, and, although it appears that her motion was not rapid, it was not as slow as it might and ought to have been, if he was bound to know that the attempt to pass was hazardous. The case, I think, should have been put to the jury upon these principles."

¹ Vincent v. Stinehour, 7 Vt. 62; Gates v. Miles, 3 Conn. 64, and cases cited; Loubz v. Hafner, 1 Dev. 185.

² Gregory v. Piper, 9 B. & C. 591; and see Welch v. Durand, 36 Conn. 182.

³ Jordan v. Wyatt, 4 Gratt. 151.

* In Brown v. Neal, 36 Maine, 407, which was an action of trespass *quare clausum* committed in the construction of a road, the court, per Shepley, C. J., in overruling exceptions to the verdict, said: "When is a trespass to be regarded as involuntary or by negligence or mistake? It may be involuntary or committed by mistake, when a person believes that he is doing an act upon his own land, or upon the land of another by permission, when he in fact is not, but is doing it upon land on which he had no right to enter. It may be committed through negligence, when a person designs to do an act upon land on which he might lawfully do it, and from want of proper care or attention, he passes on to the land of another, claiming no right, and having no intention to do so. It cannot be involuntary or by mistake, when one knowingly enters upon the land of another, claiming right to do so. If there be neglect, or mistake in such case, it must arise from want of care to ascertain whether he had any legal right to do so, or from a mistake of the law respecting it." Hathaway, J., did not concur in the foregoing remarks of the Chief Justice, but submitted his views as follows: "If a man get over the line between him and his neighbor by mistake, and cut a tree, supposing he is on his own land—or if he suppose he has permission, when in fact he has not, the act is voluntary; the *trespass* is involuntary. He did not intend to do wrong. In this case, the defendant made the road, supposing he had lawful permission. He was mistaken. True, he neglected to inform himself that the road was not legally made out; and so, the man

§ 9. An authority in law affords a justification for all acts and trespasses committed in the exercise of it, so long as the authority has not been abused or exceeded. An action will not therefore lie against a judge for a wrongful commitment or an erroneous judgment, nor for any act done by him in his judicial capacity; nor against a grand jurymen for wrongfully presenting and finding a bill of indictment; nor against a petty jurymen for a wrong verdict; nor against a coroner, who is a judicial officer, for any matter done by him in the exercise of his judicial functions. The general rule as respects judges and judicial officers is, that if they do any act beyond the limit of their authority causing injury to another, they thereby subject themselves to an action for damages; but if the act done be within the limit of their authority, through an erroneous or mistaken judgment, they are not liable to an action.¹

§ 10. Where persons do not act judicially, but have only a discretion confided to them, an erroneous exercise of that discretion will not make them liable, if they have due legal authority and power to act in the matter.² Consequently, if an order has been made in a cause in court over which the court has a general jurisdiction, the ministerial officer who executes it, is not responsible; and the clerk of the court is likewise protected so long as he confines himself to the ministerial duties of his office.³* For the same reason, it is a

who got over the line neglected to inform himself where the line was, and he who cut without permission, supposing he had one, neglected to ascertain the fact. There is a distinction in the cases, but too shadowy, I think, to make a difference."

In North Carolina, where a person occupying land, trespassed on the adjoining premises through ignorance of the true boundary, but disclaimed title, and tendered reasonable amends before action brought, it was held that the trespasser was protected under the statute (Rev. Sts. ch. 31, § 83; *Blackburn v. Bowman*, 1 Jones' Law, N. C. 441).

¹ *Hammond v. Howell*, 1 Mod. 184; 2 Mod. 218; *Doswell v. Impey*, 1 B. & C. 163; *Gahan v. Lafitte*, 5 Moore P. P. C. 382.

² *Ferguson v. Earl Kinnoul*, 9 Cl. & Fin. 290.

³ *Andrews v. Marris*, 1 Q. B. 3; *Dews v. Riley*, 11 C. B. 434.

* Where a writ of *habeas corpus*, issued at the instance of a person in custody, is afterwards countermanded by him without the knowledge of the officer who executes it, the officer will not be liable. Action for assaulting the plaintiff and

justification of the acts of a United States officer that they were done under lawful public orders;¹ but not where the orders were given without authority.²

§ 11. The lawful character of an occupation, or the care with which it is carried on, will not defeat a right of action by those whose enjoyment of life and property is disturbed in consequence of the mode or means of conducting such occupation. The right, for instance, to use a steam engine on one's own premises, does not depend upon its utility and lawfulness, or the purpose for which such use is resorted to, nor upon the final results of the use. The intermediate injury before such results are obtained, may make the use unlawful.³ An act may be lawful in itself, and continue to be so until injury has been inflicted, when it immediately becomes unlawful, and an action will lie therefor; as where a person sinks mines, and digs in his own land, or kindles a fire thereon, doing no damage in the first instance to his neighbor, but afterward causing his neighbor's land to slide into the artificial hollow, or the neighbor's house to be burned by the unexpected spreading of the fire.⁴ Where the plaintiff and defendant, who were porters on the custom-house quay, had each small boxes in a hut on the quay for

compelling him to go to the Arches Court. Plea that the defendant was keeper of the queen's prison, and the plaintiff a prisoner there; that a writ of *habeas corpus* issued, commanding the defendant to have the body of the plaintiff at the Arches Court; that the plaintiff refused to go, wherefore the defendant compelled him, &c. Replication, that the writ issued at the instance of the plaintiff, and no other person, as the defendant well knew, and that the plaintiff gave notice to the defendant not to execute. Rejoinder, that the defendant did not know that the writ issued at the instance of the plaintiff, and no other person. It was held that this issue was not supported by evidence that the plaintiff's agent informed a person, who was clerk of the papers and deputy keeper of the prison, that the writ was issued by the plaintiff, and that he was not to be taken before the Court of Arches, the writ itself not containing on the face of it the name of the party at whose instance it was sued out (*Herring v. Hudson*, 3 Exch. 107; 18 L. J. Exch. 28).

An action of trespass cannot be maintained for injury committed under orders of a military officer in a case of extreme necessity (*Barrow v. Page*, 5 Hayw. 97).

¹ *Durand v. Hollins*, 4 Blatchf. C. C. 451.

² *Lively v. Ballard*, 2 W. Va. 496.

³ *McKeon v. See*, 4 Robertson, 449.

⁴ *Bonomi v. Backhouse*, Ell. Bl. & Ell. 622; 28 L. J. Q. B. 378; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Filliter v. Phippard*, 11 Q. B. 347; *Tubervil v. Stamp*, 1 Salk. 13; *Clark v. Foot*, 8 Johns. 421.

storing small parcels of goods until they could be put on board of ship, and the plaintiff placed some goods in the hut in such a manner that the defendant could not get to his box without removing them, which he accordingly did, but forgot to put them back again, and the goods were lost, it was held that, although the defendant had a right to remove the goods, yet, as he had not returned them to the place where he found them, there might be ground for an action of trespass in meddling with them.¹*

§ 12. The law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statute. It has been held that if the owner of a horse knowingly lets him on Sunday to be driven to a particular place, but not from any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, an action cannot be maintained against him for such injury, although it is occasioned in going to a different place, and beyond the limits specified in the contract.² If a gang of counterfeiterers should quarrel about the division of their stock or tools, and one should take the whole, in violation of the laws by which such associations subsist, a court of justice would not interfere, it being deemed a scandal that such matters should be discussed or adjusted. One who sets himself deliberately to work to contravene the fundamental laws of civil government, forfeits his own right to protection in those respects wherein he was endeavoring to infringe the rights of others.³ Consequently, the prevention of an unlawful act, does not constitute a valid cause of action on the part of the would-be offender who is interfered with in the commission of his in-

¹ *Bushel v. Miller*, 1 Str. 129.

² *Lord v. Chadbourne*, 42 Maine, 429; *Gregg v. Wyman*, 4 Cush. 322.

³ *Spaulding v. Preston*, 21 Vt. 9.

* The right of a person to use his property as he pleases is unlimited and unqualified up to the point where the particular use becomes a nuisance (*Fisher v. Clark*, 41 Barb. 329).

tended offense.¹ * The general principle involved in the cases is, that the law distinguishes between rights acquired in conformity with, and arising under its provisions, and claims originating in their clear and palpable violation; that it will not enforce claims made in contravention of its mandates, nor protect property held against, and being used for the deliberate purpose of disobeying its enactments.²

¹ Bangor &c. R. R. Co. v. Smith, 49 Maine, 9.

² Lord v. Chadbourne, 42 Maine, 429.

* "Governments, upon the most obvious principles of necessity, exercise more or less of preventive force. All sanitary cordons, and preventive regulations, everything in regard to the police of our cities and large towns, prohibitions of lotteries, gambling-houses, brothels and disorderly taverns, whether done by general statutes, or mere police regulations, come under the right of preventing more serious injuries. This must, of course, somewhat interfere with the natural rights of individuals. One infected with contagion is instantly removed beyond the reach of contact. A ship or cargo coming from an infected port is subjected to long delay and great expense, to prevent the possibility of spreading pestilence. This may, in some instances, endanger the lives and health of the individuals concerned, and must always more or less affect property, and abridge personal liberty. And it is often done without any special law, and may always be so done,—as in the case of cholera suddenly breaking out in some remote inland town. What would be thought of an action for assault and battery brought against a health officer who removed the plaintiff from a town or village to prevent contagion; or against the peace officer who laid his hand upon one under an honest belief that he was insane; or against the sheriff who, by direction of the prosecuting attorney, detains counterfeit coin, or those partly finished? We find no such actions in the books; and the want of precedent shows the general sense upon the subject, when it is notorious that the public officers in our cities subject persons suspected of crime, and every species of engine and material with which it is even suspected they intend to operate, to just such restrictions as they deem proper, and this without regard to any special provision of law. The same is true, also, of those suspected of infection. And with regard to unwholesome provisions, if found to be so in a dangerous degree, they may even be destroyed. So, too, of books and prints, and of all other devices to corrupt the public morals. So, likewise, certain trades are considered common nuisances in places of great public resort or concourse—like the smelting of metals, slaughtering animals, &c., which would be likely to endanger the public health. And gambling-houses and brothels have been regarded as common nuisances in the cities. Society, in these cases, and many others, has the right to anticipate, in order that it may prevent the injury which is thus threatened. If it were not so, men in a social condition would be far more powerless for purposes of defense than in a natural state" (Redfield, J., in *Spalding v. Preston*, 21 Vt. 9).

The police power extends to the search, seizure, and destruction of property. Nuisances may be abated in the most summary manner; dogs found chasing sheep may be shot down; gambling implements be destroyed; lottery tickets and obscene prints prohibited; and, under the quarantine laws, the health officer of a city, to prevent the spread of infection or contagion, may destroy bedding or clothing, or any part of the cargo of a vessel. Gunpowder kept in improper places may be seized and confiscated. The exercise of this authority is a power of prevention, highly conservative in its character, and essential to the well-being of the body politic, and ought not to be characterized as arbitrary or despot.

3. *Infringement of right without specific injury.*

§ 13. Whenever a person establishes a legal right or title in himself, which has been invaded, weakened, or destroyed by the unlawful act of another, which act would be evidence in future in favor of the wrong-doer, an action for damages may be maintained, although no pecuniary loss can be proved.¹ Therefore, where a person has a right to a stream flowing through his land, he may maintain an action for the diversion of the water, though he has not used and does not want to use it.² So, likewise, when it was suggested by the defendant, in an action for overflowing land which the plaintiff owned in fee, that the injurious acts were continued but a short time, and that instead of being an injury they were a benefit to the land, the court replied that no infringement of the rights of another could be justified on the ground that the act was a benefit to the owner, if it was done against his will.³ Again, the court refused to set aside a verdict for the plaintiff, in an action for trespassing upon his several fishery, though the defendant caught no fish, on the ground that the act of fishing was not only an infringement of the plaintiff's right, but would be evidence of using and exercising the right by the defendant, if the act were overlooked.^{4*} And

¹ *Embrey v. Owen*, 6 Exch. 353; *Canal Co. v. King*, 14 Q. B. 122; *Webb v. Portland Manf. Co.* 3 Sumner, 197; *Woodman v. Tufts*, 9 N. Hamp. 88; *Snow v. Cowles*, 2 Fost. 302; *Cowles v. Kidder*, 4 Ib. 379; *Basset v. Salisbury Manf. Co.* 8 Ib. 455; *Nicklin v. Williams*, 10 Exch. 259; *Wintringham v. Lafoy*, 7 Cowen, 735; *Cadwell v. Farrell*, 28 Ill. 438.

² *Embrey v. Owen*, *supra*.

³ *Tillotson v. Smith*, 32 N. Hamp. 90.

⁴ *Patrick v. Greenway*, 1 Wms. Saund. 346, note 2.

* The maxim *de minimis non curat lex* is "never applied to the positive and wrongful invasion of another's property. 'To warrant an action in such a case,' says a learned writer, 'some temporal damage, be it more or less, must actually have resulted, or must be likely to ensue. The degree is wholly immaterial; nor does the law upon every occasion require distinct proof that an inconvenience has been sustained. For example, if the hand of A. touch the person of B., who shall declare that pain has or has not ensued? The only mode to render B. secure is to infer that the inconvenience has actually resulted' (*Hammonds N. P.* 39). 'Where a new market is erected near an ancient one, the owner of the ancient market may have an action, and yet perhaps the cattle that would have come to the old market might not have been sold, and so no toll would have been gained, and consequently there would have been no real damage; but there is a possibility of damage' (2 *Ld. Raym.* 948). In *Ashby v. White*, wherein *Powell, J.*, laid down this rule as to the market, it was held finally by the house of Lords, that to hinder a burgess from voting for a member

it has been held that where a tenant makes material alterations in property let to him, by opening new doors, erecting new buildings, removing partitions, or changing the form and appearance of a house, without the consent of the landlord, he is liable in damages, although the premises may have been enhanced in value by the alterations.¹ *

4. *Motive or intention.*

§ 14. It is a general rule, "that when one does an illegal or mischievous act which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable, in some form of action, for all the consequences which may directly and naturally result from his conduct; and, in many cases, he is answerable criminally as well as civilly. It is not necessary that he should intend to do the particular injury which follows, nor indeed any injury at all. If a man, without just cause, aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon the friend, and may be murder if a deadly weapon was used and death ensued. Or, if in attempting to steal or destroy the property of another, he unfortunately wound the owner or a third person, he must answer for the consequences, although he did not intend that particular mis-

of the House of Commons was a good ground of action. No one could say that he had been actually injured, or would be; so far from it, the hindrance might have benefited him. But his franchise had been violated" (Cowen, J., in *Seneca R. Co. v. The Auburn & Rochester R. R. Co.* 5 Hill, 170).

¹ *Cole v. Green*, 1 Lev. 309.

* The English courts seem inclined to break up the whole system of giving verdicts when no actual injury has been done, unless there be some right in question which it was important for the plaintiff to establish. In *Williams v. Mostyn*, 4 M. & W. 145, where case was brought for the voluntary escape of one Langford taken on *mesne process*, and it was admitted that the plaintiff had sustained no actual damage or delay, the defendant having returned to the custody of the plaintiff, a verdict was found for the plaintiff for nominal damages. But, on motion, the court directed a nonsuit to be entered, saying that there had been no damage in fact or in law. So, in a suit brought by the owner of a house against a lessee, for opening a door without leave, the premises not being in any way weakened or injured by the opening, the court refused to allow nominal damages, and remitted the case to the jury to say whether the plaintiff's reversionary interest had, in point of fact, been prejudiced (*Young v. Spencer*, 10 B. & C. 145; 21 Eng. C. L. 47).

chief. And although no mischief of any kind may be intended, yet if a man do an act which is dangerous to the persons or property of others, and which shows a reckless disregard of consequences, he will be answerable civilly, and in many cases criminally, for the injuries which may follow—as if he discharge a gun, or let loose a ferocious or mad animal in a multitude of people, or throw a stone from the house-top into a street where many are passing, or keep a large quantity of gunpowder near the dwelling of another. In these and similar cases, he must answer for any injuries which may result from his misconduct to the persons or property of others.”¹

§ 15. It is the duty of every one who assumes to interfere with the property of a third person, to ascertain whether he is acting under due authority, and he cannot excuse himself to any one who has been injured by his conduct by the suggestion that he supposed he was acting under proper authority. His suppositions are not matters of defense.² A. having sold to B. a steer running at large on a prairie, pointed out, by mistake, the steer of another person, which B. killed. It was held that trespass would lie against both jointly; but not if the steer had been pointed out by a stranger.³ * And where, in an action of trespass for taking an ox belonging to the plaintiff, it was proved that the defendant met the plaintiff in the street, and bought of the latter an ox, which the plaintiff directed him to go and take out of his inclosure, and that by mistake he took the wrong ox, it was held that the defendant was liable. The court reasoned thus: “The taking of the plaintiff’s ox was the deliberate and voluntary

¹ *Vandenburgh v. Truax*, 4 Denio, 464, per Bronson, Ch. J.: *post*, §§ 111, 282.

² *Johnson v. Stone*, 40 N. Hamp. 197; *Amick v. O’Hara*, 6 Blackf. 258; *Dexter v. Cole*, 6 Wis. 319.

³ *Hamilton v. Hunt*, 14 Ill. 472.

* Where a license has been obtained under a mistake and misunderstanding between the parties, without fraud, the license will be a nullity, but the misunderstanding will go in reduction of damages in an action for the unintentional trespass (*Bridges v. Blanchard*, 1 Ad. & E. 536; see *Davies v. Marshall*, 10 C. B. N. S. 697).

act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes, by mistake, the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers."¹ *

§ 16. In civil trespasses, the law considers the damage actually inflicted upon the party wronged, rather than the intent or malice of him who is the wrong-doer; though the *quo animo* is sometimes shown in mitigation or aggravation of damages. To maintain the action, it is not necessary to prove that the act was done with any wrongful intent; it being sufficient, if it was without any justifiable cause or pur-

¹ Hobart v. Hagget, 12 Maine, 67; and see Basely v. Clarkson, 3 Lev. 37; Higginson v. York, 5 Mass. 341.

* As a man may be guilty of a high crime if he rashly and recklessly, without proper precaution, does an act which injures another, although he does not intend to commit the crime or actually know that he is doing so, *a fortiori* he may be guilty of a trespass (Com. v. Cornish, 6 Bin. 249). "If the law were otherwise, farmers and people in villages, where cattle are allowed to run at large, would be exposed to great trouble and expense in regaining their cattle driven off by the agents and servants of drovers, because in the action of trover, if they were driven to that, the measure of damages would be the value of the goods and chattels at the time of demand, with interest, which would be no compensation for the loss of time, expense and trouble in pursuing cattle to a great distance" (Coulter, J., Brooks v. Olmstead, 17 Penn. St. R. 24).

In Percival v. Hickey, 18 Johns. 257, which was an action of trespass by the master of the American schooner *Mary* against the commander of the British schooner *Atlanta*, it was insisted that the defendant and those on board the cruiser believed the *Mary* to be a French vessel; that she was pursued as such, with the intention to capture her as prize of war; and although it turned out she was not a French but an American vessel and a neutral, yet the acts of the defendant were done with the intention to capture her, and that, therefore, the question was one of prize or no prize, and of admiralty jurisdiction. The Supreme Court, per Spencer, Ch. J., in taking a contrary view, said: "I cannot assent to this conclusion. The intention to capture the *Mary* as a prize depended altogether on the supposition that she was a French vessel. It did not exist if she was in fact an American vessel. It was, therefore, a conditional intention, depending on the event. As the character of the *Mary* during the chase was uncertain, the defendant was bound to conduct himself in such a manner that his acts should be justified by the event. The intention, in a given event, to make her a prize, did not constitute the actual pursuit of a prize. There is nothing in the whole course of the transaction to show that, in point of fact, the defendant treated the *Mary* as a prize, or that when her national character was discovered he would have detained her as a prize, or for any violation of neutrality. I cannot, therefore, consider the injury received by the *Mary* in any other light than as a marine trespass."

pose.¹ In *Guille v. Swan*,² Swan brought an action of trespass in a justice's court against Guille for injury to his garden. It appeared that Guille, having ascended in a balloon, came down in Swan's garden, followed by a large number of persons to whom, being in a perilous situation as he descended, he called out for help, and that some damage was done to the garden by the balloon, but much more by the crowd in treading down vegetables and flowers. The justice charged the jury that the defendant was liable for the whole damage, and a verdict having been found accordingly, it was held correct.* A similar decision was rendered in England, where the defendant followed hounds, accompanied by a large concourse of persons on foot and on horseback, over the plaintiff's land, destroying the fences and injuring the crops.³

§ 17. But although, as we have already stated, the intention with which the wrong was committed is not in general

¹ 2 Greenlf. Ev. § 622; Broom's Leg. Max. 221; *Sanderson v. Baker*, 2 W. Blk. 832; *Cate v. Cate*, 44 N. Hamp. 211.

² 19 Johns. 381.

³ *Hume v. Oldacre*, 1 Stark. 351.

* In *Guille v. Swan*, *supra*, the Supreme Court, in affirming the judgment, said: "The counsel for the plaintiff in error supposes that the injury committed by his client was involuntary, and that that done by the crowd was voluntary, and that therefore there was no union of intent; and that upon the same principle which would render Guille answerable for the acts of the crowd in treading down and destroying the vegetables and flowers of Swan, he would be responsible for a battery or a murder committed on the owner of the premises. The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong. I will not say that ascending in a balloon is an unlawful act, for it is not so. But it is certain that the aeronaut has no control over its motion horizontally. He is at the sport of the winds, and is to descend when and how he can. His reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent under such circumstances would ordinarily and naturally draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation, all this he ought to have foreseen, and must be responsible for. Whether the crowd heard his call for help or not is immaterial. He had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid and gratifying a curiosity which he had excited. Can it be doubted that if the plaintiff in error had beckoned to the crowd to come to his assistance that he would be liable for their trespass in entering the inclosure? I think not. In that case, they would have been cotrespessors, and we must consider the situation in which he placed himself voluntarily and designedly as equivalent to a direct request to the crowd to follow him. In the present case, he did call for help, and may have been heard by the crowd. He is, therefore, undoubtedly liable for all the injury sustained" (see 4 Denio, 467).

material, yet there are many instances in which the character of an act depends entirely upon the motive.¹ The intent to seduce a wife or daughter would greatly aggravate a trespass.² On the other hand, proof that the defendant entered the plaintiff's premises for the purpose of viewing a horse belonging to him which had been recently stolen, and was then there, would almost amount to a justification.³ An unlawful act done wilfully and purposely to the injury of another, is as against that person, malicious; and if he do not justify or excuse it, the law will imply a bad intent. But he may prove that his intentions were good,—that he was actuated by no ill will against the plaintiff,—and that his demeanor was that of a person who meant no wrong.⁴ Such evidence, however, as already intimated, will only bear upon the question of damages, and will not in any way tend to defeat the plaintiff's right to recover.⁵

§ 18. When an act is legally done, it cannot be made illegal *ab initio* unless by some positive act incompatible with the exercise of the legal right to do the first act. The mere intention to do a subsequent illegal act, being from its nature mutable, cannot be substituted for the act itself. This obviously correct principle was illustrated in *Gates v. Lounsbury*,⁶ which was an action for assault and battery. The defendant pleaded that he laid his hands upon the plaintiff to prevent him from taking away the defendant's horse. The plaintiff replied that the horse was wrongfully on his land doing damage, and he was leading him off of the land towards a certain pound with intent to impound him as

¹ 1 Chit. Pl. 377; 1 Saund. Pl. & Ev. 343; 1 Wms. Saund. 242, *n.* 2; Archb. Civ. Pl. 205; *Gates v. Lounsbury*, 20 Johns. 427; *French v. Marstin*, 4 Post. 440.

² *Matteson v. Curtis*, 11 Wis. 424.

³ *Webb v. Beavan*, 7 Scott N. R. 936; 6 Man. & G. 1055.

⁴ *Sears v. Lyons*, 2 Stark. 317; *Rex v. Woodfall*, 5 Burr. 2667; *Rex v. Topham*, 4 T. R. 194; *Com. v. Snelling*, 15 Pick. 321; *Colby v. Jackson*, 12 N. Hamp. 526; *Handy v. Johnson*, 5 Md. 450; *Roth v. Smith*, 41 Ill. 314.

⁵ *Sherman v. Kortright*, 52 Barb. 267; *Bruch v. Carter*, 3 Vroom, 554.

⁶ 20 Johns. 427.

a distress, when the assault and battery was committed. Rejoinder that the plaintiff was leading the horse towards the pound with intent to impound him as a distress before he had made application to the fence viewers of the town, to ascertain and appraise the damage, whereupon the plaintiff was a trespasser from the beginning. Held, on demurrer, that the rejoinder was bad.*

§ 19. Bad motives in doing a thing which does not violate the legal rights of another, cannot be made a ground of action. Where, therefore, it was alleged that the defendant, contriving and wrongfully intending to annoy and injure the plaintiff in the use of his dwelling-house, erected, or caused to be erected, on the defendant's premises, immediately adjoining the plaintiff's dwelling-house, and before his windows and doors, a board fence of from eight to ten feet high, and covered it with gas tar, and permitted it to remain so, by means of which offensive and unwholesome smells arose and came into and upon the premises of the plaintiff, and annoyed him, and rendered his said dwelling-house unhealthy and unfit for habitation; it was held that there was no cause of action.¹†

¹ Pickard v. Collins, 23 Barb. 444.

* In the above case, Spencer, Ch. J., in delivering the opinion of the Supreme Court, said: "The rejoinder attempts to put in issue a fact not triable, the intent of the plaintiff to impound the horse in the pound of the town, or public pound, before application was made to the fence viewers to ascertain and appraise the damage. If that intent had actually existed at the time of taking the horse, it was revocable. The plaintiff had a perfect right to change his intention at any time before the horse was actually placed in the public pound. The taking the horse is admitted by the replication to have been lawful. The illegality of that act depended on the subsequent conduct of the plaintiff in putting the horse in a public pound before the damages were appraised."

† In Pickard v. Collins, *supra*, the judge at the circuit charged the jury that the defendant had no right "to build a fence in an unusual manner, materially to injure and annoy his neighbor, and deprive him of the use of his lot, for a man is bound so to use his own as to do no needless injury to his neighbor;" and, further, "if you find the defendant put this fence there, or covered it with gas tar, as stated by the witness, for the purpose of injuring or annoying the plaintiff, and rendering the use and enjoyment of his premises uncomfortable, or unhealthy, and it had that effect, that would be an unreasonable use of his property, and he must be responsible for any damages or injury done thereby." Judgment having been rendered for the plaintiff, the General Term of the Supreme Court, in reversing it for error in the charge, said: "The instruction in question, if sustained, would carry the doctrine so far, and make the owner of land liable for

5. *Liability for consequences of wrongful act.*

§ 20. The rule is well settled, that a party doing or causing an illegal act to be committed, is liable for all the consequences which flow immediately therefrom;¹ and the liability is not varied by the fact that the consequences of the injurious act might have been prevented by the care and skill of the injured person.² A. seized the arm of B. in the hall of a school-house, swung him violently around, and then let him go. B. struck against C., who pushed him off, and B. hit against a hook in the wall and was injured. In an action of trespass by B. against A. therefor, it was held that the plaintiff was entitled to recover.³

In an action for running into the plaintiff's carriage with the defendant's wagon, it was objected that the injury being consequential, trespass could not be maintained. It was held, however, that as the consequence was immediate, the defendant was to be deemed the active doer of all that directly followed, and a trespasser.⁴

Vandenburgh v. Truax⁵ was an action of trespass for

such acts, if done with a bad motive. * * * Such a principle would be highly dangerous to the security of the enjoyment of real property. As to various modes of enjoyment, the lawfulness or unlawfulness of them would depend on the views of others as to the intentions of the owner. The fallacy of this doctrine consists in its overlooking a fatal defect in such a case—the absence of any legal injury.”

In *Bartlett v. Kinsley et al.* 15 Conn. 327, the question arose whether, when the proceedings of a corporate meeting appear regular and legal, and within the legitimate powers of the body, persons are to be adjudged trespassers who, in the proper discharge of duty, assist in carrying them into effect, because the real purpose of a majority of voters, either open or concealed, was to effect an illegal object. The court, in holding the negative, said: “We have no doubts upon this question, and should have none, though it could be proved that these defendants participated in such unauthorized purpose. The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views, nor the public declarations of individual members of such corporation, are for this purpose to be inquired after” (citing *Fletcher v. Peck*, 6 Cranch, 87).

¹ *Burton v. McClellan*, 2 Scam. 434.

² *Phares v. Stewart*, 9 Port. 336; *Munger v. Baker*, 1 Thompson & Cook N. Y. Supm. Ct. R. 122.

³ *Ricker v. Freeman*, 50 N. Hamp. 420.

⁴ *Burdick v. Worrall*, 4 Barb. 596, citing *Scott v. Shepherd*, 2 W. Black. 892; *Leame v. Bray*, 3 East, 593.

⁵ 4 Denio, 464.

wilfully driving a colored boy behind the counter in the plaintiff's store, whereby a faucet was knocked from a barrel of port wine, and the wine destroyed. It appeared that the boy, who was sixteen or eighteen years of age, was seen in the street, near the plaintiff's store, approaching the defendant, with a stone in his hand; that the defendant took hold of the boy, and told him to throw the stone down; that the boy got away from the defendant, who pursued him with a pickaxe into the plaintiff's store; and that the boy, running behind the counter to save himself from the pickaxe, did the mischief complained of. At the trial of the case before a justice of the peace, judgment was rendered for the plaintiff, which was affirmed by the Common Pleas and afterward by the Supreme Court.

A.'s carriage was driven against the wheel of B.'s chaise. The collision threw a person who was in the chaise upon the dashing-board. The dashing-board fell on the back of the horse, and caused him to kick, and thereby the chaise was injured. It was held that B. was entitled to recover in trespass against A. damages commensurate with the whole of the injury sustained.¹

The following somewhat familiar case is a good illustration of the responsibility of a person who is the first, though not the immediate agent in causing the injury. Shepherd threw a lighted squib, composed of gunpowder, into a market-house, where a large number of people were assembled. It fell on the standing of A., and, to prevent injury, it was thrown off his standing across the market, when it fell on another standing; from thence, to save the goods of the owner, it was thrown to another part of the market-house, and in so throwing it, it struck the plaintiff in the face, and bursting, put out one of his eyes. Three of the judges against one held that Shepherd was answerable in an action of trespass and assault and battery. De Grey, Ch. J., remarked that throwing the squib was an unlawful act; and

¹ Gilbertson v. Richardson, 5 C. B. 502; 12 Jur. 292; 17 L. J. 112.

that whatever mischief followed, the person throwing it was the author of the mischief. All that was done subsequent to the original throwing was a continuation of the first force and the first act. Any innocent person removing the danger from himself was justifiable; the blame lights upon the first thrower; the new direction and new force flow out of the first force. He laid it down as a principle, that every one who does an unlawful act is considered as the doer of all that follows.¹ *

§ 21. Where the wrongful act of the defendant was the proximate cause of the injury to the plaintiff, which would not have occurred but for that, the defendant is liable, although other causes for which he was not in fault might have contributed to the result.² Therefore, executing a bond

¹ *Scott v. Shepherd*, 2 W. Blk. 892; s. c. 3 Wils. 403.

² *Hooksett v. Amoskeag Manf. Co.* 44 N. Hamp. 105.

* The party injured, either in his person or property, by the discharge of a gun, even when the act is lawful, as at a military muster and parade, and under the orders of a commanding officer, is entitled to redress in a civil action to the extent of his damage. And where the act is unnecessary—a matter of idle sport and negligence—and, still more, when the act is accompanied with purposes of wanton or deliberate mischief, and any hurt or damage ensues, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security. *Cole v. Fisher*, 11 Mass. 137, was an action of trespass, for causing a horse to run away with a carriage. It appeared that the defendant, after washing out his gun, in order to dry it, fired it off from his shop door, which was about a rod from the highway. The plaintiff's horse and chaise were on the opposite side of the highway, the horse being fastened to the fence by his bridle. The horse being terrified by the firing of the gun, ran away with the chaise, which was thereby broken. Sewall, C. J., in delivering the opinion of the court, said: "In the case at bar, it does not appear, from the facts stated, how near the place where the horse was fastened was to the door of the shop, the place where the gun was fired. If the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant; or if it was in evidence that he had noticed their being there, exposed to the consequences of his firing the gun, and the distance was such that, by common experience, there might be a reasonable apprehension of frightening the horse by the discharge of the gun, I should think the defendant, although no purpose of mischief was proved, and even if it was not a case of very gross negligence, liable in an action of trespass. On the other hand, if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such as that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant to render him liable in this form of action; although undoubtedly liable in an action upon the case to the extent of the damage actually sustained by the plaintiff."

which provides for a levy upon particular property not belonging to the judgment debtor, will make the obligor a trespasser.¹ But the defendant will not be liable if the cause of the injury be remote. Where, for instance, the clerk of a school district gave a certificate to the assessor of the town that at a meeting legally and duly organized (but which it afterwards appeared was not legally called), it was voted to raise a certain sum of money; and thereupon the assessors proceeded to assess the same, and cause it to be collected; it was held that the act of the clerk, being only the remote cause of the injury complained of, trespass would not lie against him.²

§ 22. The rule under consideration is equally applicable, although the damage was not sustained until some time subsequent to the commission of the wrongful act. In an action for entering the plaintiff's close, and undermining a bank near a dam that had been built across the river, whereby the water of the river three weeks afterwards carried away three acres of the plaintiff's land, it was objected, in behalf of the defendant, that the action was misconceived, inasmuch as the damage did not follow immediately and directly from the original act of digging into the bank, which act was admitted to have been a trespass. But a verdict having been found for the plaintiff for the full amount of damage sustained by him, judgment was entered on it by direction of the court.³*

6. *Inciting or aiding the commission of trespass.*

§ 23. All who with full knowledge of the facts, aid, command, advise or countenance the commission of a tort by

¹ Pozzoni v. Henderson, 2 E. D. Smith, 146.

² Taft v. Metcalf, 11 Pick. 456; and see Barnes v. Hurd, 11 Mass. 59.

³ Dickinson v. Boyle, 17 Pick. 78; *post*, §§ 112, 278.

* Where one who owned a mill dam, in order that it might not be broken by a flood, severed it at one end, whereby injury was caused to a highway near, it was held that as the cutting of the dam away was the proximate cause of the injury, he was liable (*The State v. Knotts*, 2 Speers, 692).

another, are equally liable with him who commits it.¹* No one is allowed to incite another to a wrong, and after its commission to give his want of influence in evidence in bar of an action. A. directed a police officer to take B. into custody on a charge of embezzlement, and the officer having done so, the officer and A. went together to a box of B., and the officer, in the presence of A., searched the box, and took from it a sovereign. In an action by B. against A. for the

¹ Judson v. Cook, 11 Barb. 642; Clark v. Bales, 15 Ark. 452; McMurtrie v. Stewart, 21 Penn. St. R. 322; Horton v. Hensley, 1 Iredell, 163; Ferguson v. Terry, 1 B. Mon. 96; Fox v. Jackson, 8 Barb. 355; Adams v. Freeman, 9 Johns. 117; Collins v. Ferris, 14 Johns. 246; Mallory v. Merritt, 17 Conn. 178; Hall v. Howd, 10 Conn. 514; Williams v. Brace, 5 Ib. 190; Thames Manf. Co. v. Lathrop, 7 Ib. 550; Welsh v. Cooper, 8 Penn. St. R. 217; Bell v. Miller, 5 Ham. 250; see *post*, §§ 61, *et seq.*, and §§ 212-290.

* In *Vosburgh v. Moak*, 1 Cush. 453, all the defendants were engaged in a game of wicket on a public highway of four rods in width. The plaintiff was traveling on the highway in a wagon with his wife, and while passing was struck in the pit of the stomach and much injured, by the ball which the players were using. It appeared that the ball being wet, slipped in the hand of the thrower, and was thus turned from the intended direction, and struck the plaintiff as already stated. At the trial in the Court of Common Pleas, the liability of the thrower of the ball was not disputed; but the judge was asked to instruct the jury as to the other defendants, that, under a certain state of facts assumed by the defendant's counsel, they ought not to be held responsible. The judge charged as follows: "If the defendants were all engaged in the game of wicket on the public highway, and if, from the situation of the road, the number of persons passing, or other cause, the game there was of such a character as to endanger or expose to injury the persons traveling along the road, or their property, and the injury was received by the plaintiff while traveling along the road, without any fault on his part, the defendants would all be liable in this action, provided the party who threw the ball was acting in the usual manner of persons engaged in the game, although his object was merely to return the ball, and it took a different direction from that intended by slipping in his hand and taking a direction towards the plaintiff." Dewey, J., in delivering the opinion of the Supreme Court, said: "The limits of this road, the amount of travel thereon, the nature of the game, and the circumstances under which the plaintiff received the injury, show a clear case of liability on the part of the person by whose immediate agency the injury was occasioned. The injury was direct, and was properly the subject of an action for trespass. The further inquiry then is, were all the associates in this game of wicket jointly liable for this trespass? If liable at all, they were liable in trespass, as they were present and engaged in the game when the injury was inflicted. The ground taken in defense is, that if this injury resulted from an accidental misdirection of the ball in the hands of one of the players, the others ought not to be responsible therefor. It may be difficult in some cases to define the line with entire satisfaction as to cases where an association or many persons are engaged in a common object, and an injury is inflicted by one individual without intentional concurrence on the part of the others, or even without intention on the part of the individual who inflicts the injury, and yet, the whole number, engaged in the common object, be liable jointly for the damages sustained by the injured party. However that may be, we think no difficulty exists in the present case. The rule as stated by the presiding judge, was stated with entire accuracy and under proper limitations."

trespass, in opening the box and taking the sovereign, it was held that proof of these facts was evidence to go to the jury of A.'s participation in the wrong.¹ *Wall v. Osborn*² was an action of trespass for entering upon the plaintiff's land and taking down and carrying away a mill standing thereon. It appeared that the defendant sold the mill to one C., telling him that if he wanted help in taking down and removing the mill, he would have a man to assist him. The mill was afterwards taken down by C., but whether or not the defendant furnished any aid was not shown. The jury were instructed by the Chief Justice of the New York Superior Court, in which the case was tried, that the sale of the mill to C., and the offer of the defendant to help him in taking it away, was not such a participation in the act of removal as to make the defendant a trespasser. A judgment having been found for the defendant, the Supreme Court, in setting it aside, said: "The defendant in this case, by undertaking to sell the plaintiff's property, was the moving cause of the injury sustained by the plaintiff. On the supposition that the purchaser is perfectly responsible, the plaintiffs have been put to trouble and expense for which the defendant should be liable. If the law were otherwise, and if in such case a purchaser was irresponsible, the owner might lose his property altogether." *

§ 24. The principle that in trespass all are liable who participate in the act, will sometimes subject a person as a trespasser who has merely delegated an authority to be executed for his benefit. This is the ground upon which the real party to a suit is usually made responsible for the acts

¹ *Jones v. Morrell*, 1 Car. & K. 266.

² 12 Wend. 39.

* Where the owner of land wilfully suffers a nuisance to be created or continued by another on or adjacent to his premises in the carrying on of a business for his benefit, and under his authority, he is liable for any injury to third persons resulting therefrom (*Clark v. Fry*, 8 Ohio, N. S. 358).

A person who, while professing to sell his own trees, points out to the buyer timber growing on the land of the adjacent proprietor, is liable to such proprietor in damages, for the trees which the buyer is thereby induced to cut and carry away (*Kolb v. Bankhead*, 18 Texas, 228).

of his attorney or ministerial officers employed by him.¹ So completely is the person who gives directions to an officer identified with the acts of the officer, that he is frequently responsible, where the officer is excused. Such is the case in the familiar instances of an arrest, or a levy upon goods at the request of a party upon an execution in his favor, valid on its face, but unauthorized by a judgment.²

§ 25. Whenever an officer has power to execute process in a particular manner, his authority is a justification of all who come in his aid.* But if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act. They are not bound to obey him; and if they do, it is at their peril. The only hardship in the case is, that they are bound to know the law. But that obligation is universal.³† Where a lieutenant and private in the United States army,

¹ *Ross v. Fuller*, 12 Vt. 265.

² *Coats v. Darby*, 2 N. Y. 517.

³ *Elder v. Morrison*, 10 Wend. 128; *post*, § 160.

* The defendant may show that the act was done under the orders of any civil or military officer of the State, or of the United States, to aid in suppressing rebellion (*Hess v. Johnson*, 3 W. Va. 645; *Durand v. Hollins*, 4 Blatchf. C. C. 451).

Where in an action of trespass against a soldier, the defendant pleads in justification that he acted under the command of his superior officer, he need not give in evidence the commission of the officer, but may prove that the latter was in command of a military force, that he assumed to command as an officer, and was recognized as such (*Hardage v. Coffman*, 24 Ark. 256).

† If a militia officer issues a paper purporting to be a warrant, but which is void, directing the clerk of the company to seize the property, or arrest the body of a delinquent soldier, the clerk is under no obligation to obey it as a precept. It is, however, a command, and is as imperative, at least, as any verbal command or request made to an individual to commit a trespass. Neither command need be obeyed. And if the trespass be committed in either case, the person directing it, and the agent, are alike liable (*Batchelder v. Whitcher*, 9 N. Hamp. 239).

It is not a defense that the trespass was committed by order of the authorities, and in pursuance of the law of a State engaged in rebellion (*Lively v. Ballard*, 2 W. Va. 496). Where, however, the owner of land despoiled by the army of the late confederate States, brought an action of trespass against certain citizens for aiding in the spoliation, it was proved that such assistance was rendered under a military requisition, and the evidence tended to show, that the plaintiff being told by the commanding officer that all damages should be paid, acquiesced; the damages were assessed, but whether they were ever paid, did not appear; it was held that the defendants were not liable (*Baker v. Wright*, 1 Bush, Ky. 500).

In order to establish the defense of duress, the defendant must show that he had no reasonable means of escaping from the force or fear before the trespass was committed (*Cunningham v. Pitzer*, 2 W. Va. 264).

acting under orders of their captain, took from a person two horses, it was held that they were trespassers.¹ In *Leonard v. Stacy*,² the defendant pleaded in justification of a trespass that the goods were taken by an officer by virtue of a writ of replevin, and that he assisted the officer. The plaintiff replied that before the goods were taken away, he claimed property in them, and gave notice thereof to the defendant; and the fact being so found by the jury, the plaintiff had judgment. There the fault was the taking away the goods, after such a claim of property, without a writ *de proprietate probanda*; and no question was made whether the defendant was acquainted with the course prescribed by law in such a case. It was considered that as the act of the officer was unlawful, all concerned with him in that act were liable to the action of the parties aggrieved.

§ 26. If a stranger comes in aid of an officer in executing legal process, and the officer afterwards omits to return the writ, or by any other subsequent abuse of his authority becomes a trespasser *ab initio*, this shall not prejudice the stranger, nor make him a trespasser. The same principle applies to bailiffs who serve a writ by virtue of a precept from the sheriff. If such a writ be not duly returned by the sheriff, he is a trespasser, but the bailiff is not punishable.³

§ 27. A creditor or other assistant of an officer, acting in good faith, and intending only to discharge a legal duty, will not involve himself in any responsibility for illegal and unauthorized acts of the officer in which he took no part, and to which he did not assent. If, for instance, the creditor should go with the officer for the purpose of assisting him to levy on property for the payment of his debt, and he should direct the levy to be made on certain property alone, but do not assent to, or approve of, anything that is done

¹ *Wilson v. Franklin*, 63 N. C. 259; and see *Hogue v. Penn*, 3 Bush, Ky. 663.

² 6 Mod. 69.

³ *Oystead v. Shed*, 12 Mass. 505; s. c. 13 Ib. 520; *Wheelock v. Archer*, 26 Vt. 380.

by the officer relative to other property, he will not be responsible for the officer's conduct in relation to the latter.¹ But any abuse by the party, especially if he intermeddle officiously, will make him a trespasser. One who unnecessarily accompanied a deputy sheriff, to assist him in seizing goods under an execution, and who, at a late hour of the night, and against the will of the party rightfully in possession of goods, entered his house without the command of the deputy, aroused, alarmed, and insulted his family, and forcibly took his goods away, was held to have committed a trespass without justification or excuse.²

7. *Ratification and adoption of wrongful act.*

§ 28. A thing done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In that case, the principal is bound by the act, whether it be to his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent, and with all the consequences which follow from the same act if done by his previous authority. Sir Edward Coke³ says: "He that receiveth a trespasser and agrees to a trespass after it is done, is no trespasser, unless the trespass was done for his use, or for his benefit, and then his agreement subsequent amounteth to a precedent commandment." Such was the precise distinction taken in the Year Book,⁴ where it was held that if a bailiff took a heriot, claiming property in it himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time, as bailiff of the lord, and not for himself, without however any command of the lord, yet the subsequent ratification by the lord made him bailiff at the time.⁵

¹ Johnson v. Stone, 40 N. Hamp. 197.

² McElbenny v. Wylie, 3 Strobbh. 284.

³ 4 Inst. 317.

⁴ Hen. 4, fol. 35.

⁵ Hull v. Pickersgill, 1 B. & B. 83; Woolen v. Wright, 1 H. & C. 554.

But in order to make a person a trespasser, by the ratification and adoption of a wrong committed in his name and for his benefit, it must be proved that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious; or it must be shown that in ratifying and taking the benefit of the act, he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed.¹ Whether the assent to a trespass after it has been committed will make the party assenting a trespasser *ab initio*, in cases of mere personal tort, has been doubted. It certainly would not have that effect unless the assent were clear and explicit, and founded on full knowledge of the previous trespass.²

8. *Indemnity of innocent wrong-doer.*

§ 29. Courts will not lend their aid to a person who founds his cause of action upon an immoral or illegal act. It is a general doctrine of the common law that there can be no reimbursement or contribution in such a case, whether the parties are principals or agents.* Thus, if A. recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution.³

§ 30. The distinction taken between promises of indemnity that are and those which are not void is, that if the act directed or agreed to be done is known at the time to be a trespass, a promise to indemnify will be illegal and void; but that if it be not known at the time to be a trespass, such promise is valid, whether express or implied.⁴† Where a

¹ *Roe v. Birkenhead*, 7 Exch. 36; *Wilson v. Barker*, 1 Nev. & M. 409; *Wilson v. Tummon*, 12 L. J. C. P. 307.

² *Adams v. Freeman*, 9 Johns. 117.

³ *St. John v. St. John's Church*, 15 Barb. 346.

⁴ *Merryweather v. Nixan*, 8 T. R. 186; *Coventry v. Barton*, 17 Johns. 142; *Turner v. Jones*, 1 Lansing, 147.

* It is otherwise as to fees paid to counsel (*Percy v. Clary*, 32 Md. 245).

† There seems to be some conflict of authority as to whether, in such case, the agent having followed the directions of his principal, the law will imply a

master directed his servant to enter on the land, claiming and declaring it to be his own; and the servant, relying on the truth of the declaration, entered; but, in fact, the land belonged to another person; it was held that the act of the servant was a good consideration for the promise to indemnify.¹ And where an agent, acting under the instructions of his principal, cut timber by mistake, on land that did not belong to his principal, and the latter received it, it was held that the agent might recover of his principal what he had been obliged to pay for the trespass.²

§ 31. If A. make a valid promise to indemnify B. against

promise of indemnity. In Dunlap's Paley on Agency, 153, it is said that, although it was not at the time known to be a trespass, yet if it eventually turns out to be so, a promise of indemnity will not be implied. The author, in this proposition, excludes any question of misrepresentation or fraud by the principal, by which the agent was innocently drawn into the commission of the act. On the other hand, in Story on Agency, § 339, it is said that "there is no difference whether there is a promise of indemnity or not; for the law will not enforce a contract of indemnity against a known and meditated wrong. Where the agent acts innocently and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him." The cases cited by Judge Story are those where the conduct and representations of the principal were calculated to induce the agent to believe that he was acting innocently, while the principal knew he was not. Many of them are cases where an auctioneer has sold goods which were in the possession of the principal, and which he represents as belonging to him, knowing it to be otherwise, when afterward it turns out that he had no title, and the agent is sued, and a judgment obtained against him for their value. In these cases the principal would be permitted to practice a fraud upon the agent were he not held liable, if the law did not require him to make indemnity. In Adamson v. Jarvis, 4 Bing. 66, Best, Ch. J., said: "From reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. In Turner v. Jones, 1 Lansing, 147, Marvin, P. J., referring to Coventry v. Barton, *supra*, said: "In that case, the evidence tended to show an express promise; but the learned judge does not notice any distinction between an express and implied promise. It is a rule that where there is an express promise, the law will not imply one. The parties have chosen to fix the terms of liability. But in the absence of an express promise, I understand it to be a general principle to imply a promise, if the facts are such as, in equity and good conscience, to require a promise. * * * What can be more equitable and just than that he who claims a right to a thing, or to do an act, and employs another to take the thing or do the act—such person believing that it was needful thus to serve his employer—should indemnify the person employed, in case it should turn out that his employer could not defend him successfully in an action brought by a third person?" (Referring to St. John v. St. John's Church, 15 Barb. 346; Howe v. Buffalo, N. Y. & E. R. R. Co. 38 Barb. 124; s. c. 37 N. Y. R. 297; and see note to Paley on Agency, p. 153).

¹ Allaire v. Ouland, 2 Johns. Cas. 52.

² Randall v. Rich, 11 Mass. 494; Payson v. Whitcomb, 15 Pick. 212; Drummond v. Humphreys, 39 Maine, 347.

a trespass, and B. employ others to act for him in the transaction, and B. is compelled to pay his employees damages recovered against them for the trespass, A. will be liable to B. therefor.¹ *

¹ Stone v. Hooker, 9 Cowen, 154.

* The above case was an action on a promise to indemnify the plaintiff in taking possession of a fishing ground belonging to one Mason. It was proved that the plaintiff was employed by the defendant to take possession; that he engaged a number of persons under him; that possession was taken in a peaceable manner by drawing a seine around it; and that no damage was done to any person or property; that after they had taken possession, Mason came and attempted to cut their ropes; and that they resisted and prevented him from destroying their seine. Evidence was introduced to show that one Hounsfield was the reputed owner, and the defendant the reputed agent, and that the plaintiff so considered him. But the promise was express by the defendant that he would indemnify; and general reputation alone was relied upon to prove the agency. Mason sued Staten and Winch, two of the persons employed by the plaintiff, and recovered. Staten sued the plaintiff, and recovered on his (the plaintiff's) promise of indemnity; which judgment the plaintiff paid. Mason also obtained a judgment by confession against E. Sawyer and E. Sawyer, junior, for the same cause. Objection was made to this judgment, on the ground that it was by confession. It was proved that the defendant had notice of the causes, and was asked to defend them, but did not. Two questions were presented for the consideration of the court: 1. Whether the promise was to indemnify against an unlawful act. If not, then 2. Whether the defendant was liable, in consequence of the recovery of the judgment of Mason against the Sawyers—that judgment having been obtained by confession. A verdict having been found for the plaintiff in the court below, the Supreme Court refused to disturb it.

CHAPTER II.

TRESPASS AS A REMEDY.

1. When the action will lie.
2. Action for wrong committed by married woman.
3. Redress for the wrongful acts of minors.
4. Liability of master for wrongful acts of servant.
5. Liability of principal for wrongful acts of agent.
6. Responsibility of sheriff for the wrongful acts of his deputy.
7. Action against corporations.
8. Liability of partners.
9. Action by and against executors.
10. Liability of persons whose authority is derived from statute.
11. Action in the case of joint wrong-doers.
12. Settlement of claim for damages.
13. When party confined to remedy given by statute.
14. Declaration.
15. Plea.
16. Replication.
17. New assignment.
18. Right to open and close.
19. Evidence.
20. Damages.
21. Costs.
22. Verdict.
23. Amendment after verdict.
24. Judgment.
25. Writ of error.
26. New trial.

1. *When the action will lie.*

§ 32. To maintain the action, there must not only have been unlawful force, but the injury complained of must have been the immediate consequence of the unlawful act.^{1*}

¹ Barber v. Barnes, 2 Brevard, 491; Adams v. Hemmenway, 1 Mass. 145; ante, § 2.

* Blackstone (3 Com. 123) says: "It is a settled distinction, that, where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass *vi et armis* will lie, but an action on the special case for the damages consequent upon such omission or act."

"Though time has softened down the differences between the actions of trespass and trover, or other actions of the case, yet, looking back upon them, we find that they are in their natures, as the pleaders phrase it, essentially distinct. The one being for a wrong committed by the direct force of the malfactor, in-

When the injury is directly and forcibly inflicted,—as where a blow is given to a person, or violence done to his beast or other property,—the party aggrieved has generally no choice of actions, and trespass is his only remedy. But the necessity of suing in trespass extends no further, though the injury may have followed the forcible act without the intervention of any voluntary and responsible agency. Where he has sustained a forcible injury, effected by means flowing from the act of the defendant, but not operating by the very force and impulse of that act, he may sue in trespass, constructively treating those means as attached to, and forming part of, the defendant's act, and thus bringing that act into immediate connection with the injury; or, waiving all artificial views of the matter, he may adopt the other form of action, and treat the injury as consequential.¹*

cluded not only redress to the plaintiff, but punishment to the defendant; and the judgment was a *capitur*, upon which the person of the defendant was taken and imprisoned until he paid a fine. Upon the other hand, when a party was subjected upon a tort not committed with force, as in trover or other actions upon the case, the judgment was a *misericordia*, and the defendant was *amerced*, that is, subjected to a nominal fine merely. This difference in the nature of the actions, though there is now neither fine nor amercement, in legal idea so separates them, that counts in trespass and trover cannot be joined in the same declaration, as counts in actions of the same nature may be. If it should be said to be, at this day, theoretical rather than practical, it distinctly marks the boundary between different kinds of wrong and the different remedies appropriate to them" (Ames, C. J., in *Hunt v. Pratt*, 7 R. I. 283).

In Massachusetts, according to the new practice, there is no action of trespass in terms; but the action of tort embraces all actions of trespass (*Willard v. Baker*, 2 Gray, 336; Sts. of Mass. of 1852, ch. 312, § 1).

In Virginia, it was held in an early case, that the fraudulently opening of certain packages in the care of A. and belonging to B., and taking therefrom a part of their contents, was a trespass only (*Cook v. Darby*, 4 Munf. 444).

¹ *Waterman v. Hall*, 17 Vt. 128.

* In *Waterman v. Hall*, *supra*, the injury complained of consisted in driving the plaintiff's mare upon a log fence, whereby she was so much injured that she died, and it was held that either trespass or case would lie.

Ogle et al. v. Barnes et al. 8 Term. R. 188, was an action of trespass on the case for an injury done by the incautious and negligent steering of the defendant's ship, whereby she sailed against the ship of the plaintiffs. The plaintiffs having obtained a verdict, the defendants moved in arrest of judgment that the action was misconceived. The rule was, however, discharged. It did not appear that the injury resulted from the personal acts of the defendants, or that they were on board the ship at the time; and although it was said that they had the care, direction and management of the vessel, this might have been through the medium of other persons. Grose, J., remarked that every presumption was to be made in favor of the verdict; that, at least, nothing was to be presumed against it. And on the same principle, Lawrence, J., said: "The negligent and imprudent management of the defendant's ship does not imply that any act

§ 33. It would scarcely serve any useful purpose to attempt, in this place, a summary of all the numerous invasions of right entitling the party aggrieved to this species of redress. Each will be discussed hereafter under its appropriate head. A few miscellaneous examples may be enumerated as follows: Every unwarrantable entry on another's land;¹ casting stones, rubbish or materials of any kind thereon; throwing water out of a pail into another man's yard; fixing a spout so as to discharge water upon another's land; suffering filth to ooze through a boundary wall, and to run

was done by them; after having been guilty of the negligence which led to the mischief, they may have done everything in their power to avoid the mischief; and then, the running against the plaintiff's vessel may have been owing to the wind and tide. If it had appeared in evidence that the defendants had wilfully done the act, the plaintiff must have been nonsuited."

The distinction between those trespasses for which there is a private remedy only and those for which there may be a public prosecution, is not laid down in the books with much accuracy or precision. It seems, however, to be clear, that though every trespass which is a disturbance of the peace is indictable, a mere trespass, which is the subject of a civil action, cannot be converted into an indictable offense. It appears to be the doctrine of *Rex v. Storr*, 3 Burr. 1698, and of *Rex v. Baker*, 3 Burr, 1731, that no indictment lies at common law for a trespass committed to land or goods unless there be a riot, or a forcible entry. According to those cases, a mere invasion of private property, without a disturbance of the peace, does not concern the public, but is a private injury only for which an action of trespass lies. In England, the killing or maiming cattle belonging to another from motives of malice or revenge to the owner, is made penal by statute. In *Ranger's Case*, 2 East's P. C. 1074, which was an indictment at common law for unlawfully, with force and arms, and against the peace, maiming a horse, it was held that the indictment contained no indictable offense, for, if the offense was not within the statute, the act in itself was only a trespass.

It would hardly do to act upon the distinction between actual and implied force, and to hold that every trespass to property where there is actual force is indictable. Such a doctrine would make almost every trespass or injury to private property the subject of an indictment, and would give to the courts a fearful and alarming jurisdiction, which could be exercised in general to little other purpose than vexation and oppression. In exercising criminal jurisdiction in common law cases, courts should be under the guidance and restraint of established principles and precedents, and should not allow themselves to go beyond them. An undefined jurisdiction, or an unlimited discretion in criminal cases, is an arbitrary and dangerous power incompatible with civil liberty, and ought never to be assumed or exercised; and unless an act is made criminal by some statute, or is clearly defined to be an offense by the common law, it ought not to be treated or punished as such. The civil remedy which the law affords for trespasses to property is, in ordinary cases, a sufficient corrective (*State v. Wheeler*, 3 Vt. 344).

Where one is deceived by a trespasser through a pretense of legal authority, his consent to it will not deprive him of his legal remedy (*Bagwell v. Jamison*, Cheves, 249).

¹ 3 Blk. Com. 209; 3 Selwyn's N. P. 1101; *Wells v. Howell*, 19 Johns. 385; *Pfeiffer v. Grossman*, 15 Ill. 53; *Rowe v. Bradley*, 12 Cal. 226; *Harry v. Graham*, 6 Jones' Law, N. C. 460.

over the adjoining premises;¹ standing on one's own ground, or in the street, and with missiles breaking another's house;² the holding over and claiming title by a tenant;³ scratching the panel of another's carriage;⁴ unlawfully holding to bail;⁵ the refusal of the collector of the revenue to deliver goods after a tender of the duties;⁶ taking away one's child;⁷ enticing away or driving off slaves, though the defendant did not touch them;⁸ harboring and concealing a runaway slave.⁹*

§ 34. An action of trespass is proper, where the injury is by the direct act of the party, though done negligently;¹⁰ and in such cases the person aggrieved may usually resort either to trespass or to an action on the case.¹¹ Trespass will lie for cutting down trees on one's own premises whereby one of them accidentally falls on his neighbor's land, though there be no grass or vegetables growing thereon;¹² for injury to a canal-boat by being run foul of by a steamboat;¹³ against the master of a vessel for damaging a fishing net;¹⁴ against the captain of a steamboat for injury to the person of another by the discharge of a gun on board by his command, and in

¹ Cox v. Burbridge, 13 C. B. N. S. 430; Mason v. Keeling, 1 Ld. Raym. 606.

² Prewitt v. Clayton, 5 Monr. 4.

³ Milhouse v. Patrick, 6 Rich. 350.

⁴ Fouldes v. Willoughby, 8 M. & W. 540.

⁵ Clay v. Sweet, 1 A. K. Marsh. 194.

⁶ Conard v. Pacific Ins. Co. 6 Pet. 262.

⁷ Vaughan v. Rhodes, 2 McCord, 227.

⁸ Tyson v. Ewing, 3 J. J. Marsh. 185; Clees v. Sikes, 1 Jones' L. N. C. 310.

⁹ Kennedy v. M'Arthur, 5 Ala. 151.

¹⁰ Strohl v. Levan, 39 Penn. St. R. 177; Schuer v. Veeder, 7 Blackf. 342; Hardin v. Kennedy, 2 M'Cord, 277; Johnson v. Castleman, 2 Dana, 377; Case v. Mark, 2 Ham. 169.

¹¹ Brennan v. Carpenter, 1 R. I. 474; Blin v. Campbell, 14 Johns. 432.

¹² Nensorn v. Anderson, 2 Iredell, 42.

¹³ Case v. Mark, 2 Ham. 169.

¹⁴ Post v. Munn, 1 South. 61.

* The locating of a railroad through land so as greatly to injure the part not taken, does not constitute trespass—it not appearing that the road could have been so well located in any other way (Cleveland & C. R. R. Co. v. Stackhouse, 10 Ohio, N. S. 567).

A cause of action in trespass is not a debt within the contemplation of the bankrupt act, and is not affected by a bankrupt discharge. The fact that a verdict has been rendered, does not alter the case. Until judgment rendered there is no debt which is reached by the discharge. This has been repeatedly held in the English courts, and these cases have been followed here (Kellogg v. Schuyler, 2 Denio, 73, referring to Crouch v. Gridley, 6 Hill, 250).

his presence, though the injury resulted from a want of care merely;¹ but not in behalf of the owners of a vessel for the shooting of the captain, whereby the voyage was delayed.² Where, during a war between England and France, a British cruiser chased an American schooner, supposing her to be French, and upon overhauling her, through negligence, ran into and sunk her,—the schooner having previously hove to,—it was held that an action of trespass lay at common law, at the suit of the master of the schooner against the commander of the British vessel.³ When the negligence is gross, trespass is alone appropriate. Therefore, where quarries were worked, and rocks blasted in such a way that large quantities of rocks and stones were thrown upon the dwelling-house and premises of the plaintiff, breaking the doors and windows, it was held that the remedy was trespass, and not an action on the case.⁴ When visible, tangible, corporeal property is injured, if the injury be direct, immediate and wilful, trespass is the proper form of action, although such property be connected with, or be the means by which an incorporeal right is enjoyed.⁵ *

¹ Rhodes v. Roberts, 1 Stew. 145.

² Adams v. Hemmenway, 1 Mass. 145.

³ Percival v. Hickey, 18 Johns. 257.

⁴ Scott v. Bay, 3 Md. 431.

⁵ Wilson v. Smith, 10 Wend. 324; Wilson v. Wilson, 2 Vt. 68.

* In Wilson v. Smith, *supra*, the plaintiff declared in *case* for wilfully cutting and removing a part of the timbers and other materials composing the plaintiff's dam across the Genessee river. At the circuit, the plaintiff was nonsuited on the ground that he ought to have brought trespass and not case. The Supreme Court, in refusing a new trial, said: "The ground on which the form of the action was endeavored to be maintained at the trial, and also upon the argument at bar, was, that the right to erect the dam, for an injury to which the action was brought, was a franchise, an incorporeal hereditament; and that for an injury to property or right of that description, trespass will not lie. The principle here adverted to does not apply to the case. The right to erect the dam is a franchise. It is conferred by the Legislature, the sovereign power. It is an incorporeal right. But the dam itself is not a franchise; nor is it incorporeal. The right to keep a ferry, or to erect a bridge, or to navigate a particular river or lake by steam, may be a franchise. But the bridge itself, or the boats and machinery employed in the ferry, or the navigation of the river, may, notwithstanding, be the subjects of trespass."

Although as a general rule, for an injury to an incorporeal right case only will lie, yet it does not follow that because a right is metaphysical, everything acquired and used in its exercise must necessarily partake of the same unsubstantial nature. The distinction was taken and illustrated by Sutherland, J., in Wilson v. Smith, 10 Wend. 324. The result of his argument is, that where the property injured is tangible, though the right to use it in a particular way be a

§ 35. One may maintain trespass for an act which he has no right to do himself. As, if I grant to a man a private right of way over my land, and he should dig a ditch across the place where the right of way is granted, I can maintain trespass against him for the injury done to the land, though I have no right to dig the same ditch, because it would obstruct his way. Again, suppose I let to a man a meadow to cut and carry away the grass; if he should plow it up, I can maintain trespass against him; yet I have no right to plow up the meadow myself, for that would destroy the grass to which he has a right. Indeed, in all cases where easements exist, or where different persons have different rights to occupy the same land, there will be certain acts which violate coexisting rights which neither party may do, and for which each has his remedy.¹

§ 36. The fact that the trespass was committed with a felonious intent does not take away the civil remedy.² In England, the civil right to sue for injuries occasioned by felonies is not merged or destroyed, but suspended until conviction or acquittal. It is there said to be the duty of the party injured to bring the offender to justice, or to make some effort thereto, and that until that duty is performed, he

franchise, the person entitled to the use not only may, but must bring trespass, if the injury be direct. In *The Queen v. Soley*, 2 Salk. 594; s. c. 11 Mod. 115, it was said that if the exercise of a corporate franchise of voting for officers be hindered by noise and clamor, it is a trespass; and several old books were cited which show that the violent disturbance of another in the use of any franchise may be redressed by an action of trespass. In the Year Book, 2 H. 4, 11, it is said of a man having a private way, if another disturb him by a sword, club, or other weapon, he may declare in trespass. In Woolr. on Ways, p. 58, this case is cited with approbation. A man's cattle are driven from a common; trespass lies (1 Chit. Pl. 141). In *Wilson v. Mackreth*, 3 Burr. 1824, the defendant having dug and carried away turf and peat which the plaintiff had an exclusive right to dig for his own use, in the soil of another within certain boundaries, marked by mere stones, the plaintiff brought trespass *quare clausum fregit*. It was objected that case alone would lie. Lord Mansfield observed that there wanted nothing to answer the objection, but to state the case. He said the plaintiff's right was separate, butted, and bounded; a separate right of property to take the profit of the turf, and to dig it for that purpose. It was exclusive of all others, and the defendant had disturbed him.

¹ *Peck v. Smith*, 1 Conn. 103.

² *Cannon v. Burris*, 1 Hill, S. C. 372; *Nash v. Primm*, 1 Mo. 178.

cannot maintain an action.¹ In New York, it is provided by statute² that the right of action of any person injured by any felony shall not, in any case, be merged in such felony, or be in any manner affected thereby.³

§ 37. With respect to the assignment of a claim for a tort, it has been held, in New York, that although mere personal actions which die with the person are not assignable; yet that torts for taking and converting personal property, or for injury to personal property, and it seems, generally, all such rights of action for a tort as would survive to the personal representatives, may be assigned so as to pass an interest to an assignee, which he can now assert under the Code in a civil action in his own name, as he might formerly at common law assert in the name of the assignor.⁴ * Substantially the same rule has been adopted in Massachusetts.⁵ In Pennsylvania, it has been held that an action for unliquidated damages sounding in tort, before verdict, is not capable of assignment so far as respects the rights of third persons; but that, as between attorney and client, an agreement to assign the whole or part of a future verdict is binding, and when founded on sufficient consideration, will be enforced.⁶ In New Hampshire, in an action of trespass for taking and carrying away two lambs, the defendant pleaded an accord and satisfaction, and the plaintiff replied an assignment of the cause to his attorney, and notice of the same to the defendant before the accord. The defendant objected to the validity of the assignment, contending that it was against

¹ 4 Blk. Com. by Chitty, p. 6, note 8.

² 3 N. Y. Rev. Sts. 5th ed. p. 589.

³ Koenig v. Nott, 2 Hilton, 323; 8 Abb. 384.

⁴ Butler v. N. Y. & Erie R. R. Co. 22 Barb. 110; Purple v. Hudson River R. R. 4 Duer, 74; McKee v. Judd, 2 Kernan, 623; Hall v. Robinson, 2 Comst. 293; overruling Gardner v. Adams, 12 Wend. 297.

⁵ Rice v. Stone, 1 Allen, 566.

⁶ Patten v. Wilson, 34 Penn. 299.

* Whether a wife can assign a claim for damages for a tort without her husband, *quære*. She could not do so at common law without his privity and concurrence; although courts of equity would sustain such conveyances when her intention so to do was made apparent (Sherman v. Elder, 1 Hilton, 178).

public policy, champertous, and void. The assignment was, however, sustained.^{1*}

2. *Action for wrong committed by married woman.*

§ 38. At common law, the husband is liable for the torts or wrongful acts of his wife during coverture, when such wrongs are prejudicial to the person or property of others. The action for the redress of such wrongs is brought against both husband and wife.² If the tort be done by the wife in the company of her husband, the law presumes coercion on his part, or his direction to the wife, which excuses her from responsi-

¹ *Jordan v. Gillen*, 44 N. Hamp. 424.

² *Head v. Briscoe*, 5 C. & P. 484; *Whitmore v. Delano*, 6 N. Hamp. 543; *Mathews v. Fiessel*, 2 E. D. Smith, 90; *Kowing v. Manly*, 57 Barb. 479; 2 Abb. N. S. 377; *Anderson v. Hill*, 53 Barb. 238; *Baker v. Young*, 44 Ill. 42; *post*, § 221.

* Maintenance, which includes champerty, is defined to be an unlawful taking in hand or upholding of quarrels and sides, to the disturbance and hindrance of common right; or it may be confined to cases where a man improperly and for the purpose of stirring up litigation and strife, encourages others to bring actions or to make defenses which they have no right to make (3 Greenlf. Ev. § 180). In *Findon v. Parker*, 11 M. & W. 675, Lord Abinger, in order to show what would not constitute maintenance, says: "If a man were to see a poor person in the street, oppressed and abused, and without the means of obtaining redress, and furnished him with money, or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up strife and litigation, and to be guilty of the crime of maintenance. I am not prepared to say that in modern times courts of justice ought to come to that conclusion." The defendant may show that the act was justifiable, as that he already had an interest in the suit in which he advanced his money, though it were but a contingent interest, or that he assisted the party because he was a poor man (3 Greenlf. Ev. § 182; *Perine v. Dunn*, 3 Johns. Ch. R. 508). "A grant of a part of a thing in suit, made in consideration of a precedent debt, is not within the meaning of the statute against champerty" (1 Bac. Ab. 575; *Arden v. Patterson*, 5 Johns. Ch. R. 44). Judge Story, while admitting the law against acts of champerty and maintenance to be in force in the United States to a limited extent, says that a party may purchase by assignment the whole interest of another in a contract or security or other property which is in litigation, provided there be nothing in the contract which savors of maintenance; that is, provided he does not undertake to pay any costs or make any advances beyond the mere support of the exclusive interest which he has so acquired (2 Story's Eq. § 1050). In *Shapleigh v. Bellows*, 4 N. Hamp. 355, Richardson, J., said: "There is a general understanding between attorneys and their clients that the former shall retain their fees and disbursements out of the sum that may be recovered of the opposite party; and it is not uncommon that attorneys commence for poor people actions, and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus, a person in indigent circumstances is enabled to obtain justice in cases where, without such aid, he would be unable to enforce a just claim." The same thing was said by Bell, C. J., in *Christie v. Sawyer*, 44 N. H. 298; and the general doctrine was recognized in *Jordan v. Gillen*, 44 N. Hamp. 424.

bility; but such presumption is not conclusive, and the contrary may be established by proof. To exempt her from liability, both of these concurrent circumstances must exist, to wit: the presence and command of her husband. An offense by his direction, but not in his presence, does not exempt her from liability; neither does his presence, if unaccompanied by his direction.¹*

§ 39. The liability of the husband for the wrongful acts of his wife lasts during the existence of the marital relation, though they be living apart, unless they are separated by a judicial decree.² After the death of the husband, the wife

¹ Bacon's Abr. Tit. Baron & Feme; Keyworth v. Hill, 3 B. & Ald. 685; M'Keown v. Johnson, 1 M'Cord, 578; Hawk v. Haman, 5 Bin. 43; Wagener v. Bill, 19 Barb. 321; Flanagan v. Tinen, 53 Ib. 587; 37 How. 130; Peak v. Lemon, 1 Lans. 295; Cassin v. Delany, 38 N. Y. 178; Marshall v. Oakes, 51 Maine, 308.

² Head v. Briscoe, *supra*.

* The wife, during the existence of coverture, cannot be arrested under mesne process. To use the language of Blackstone, by marriage the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, incorporated or consolidated into that of the husband (1 Blk. Com. 442). Such being the legal effect of the relation, the liability of the husband for the wife's tort, or *quasi delict*, stands upon a principle of necessity as well as justice. For the wife alone cannot be sued in such a case, and if the husband were also protected from responsibility, the injured party would be entirely without redress (Macqueen on Husband and Wife, pt. 1, p. 127. As the law stood in New York prior to the Code, a husband might be arrested for a tort committed by his wife, and was bound to put in bail for both. After judgment, she might be charged in execution with her husband; but if arrested before judgment, she would be discharged upon proof of her coverture, and on filing common bail (Solomon v. Waas, 2 Hilton, 179, per Daly, J., citing Cornish v. Marks, 6 Mod. 17; 1 Ib. 8; Ventris, 49; Crookes v. Fry, 1 Bar. & Ald. 165; Taylor v. Whitaker, 2 Dow & Ry. 225; Clark v. Norris, 1 H. Bl. 235; Russell v. Buchanan, 6 Price, 139; Langstaff v. Rain, 1 Wils. 149; Pitts v. Meller, Strg. 1167; Finch v. Duddin, Ib. 1237; Berriman v. Gilbert, Barnes, 203).

In New York, for the tort of the wife, the husband can still be sued. He is a necessary party, for she cannot be sued alone. Both are chargeable for a wrong done by the wife, and both must be joined as defendants. Nor can they even plead separately, but must join in the plea. He is, therefore, a necessary defendant in the action, and as the wife never could be arrested, the 179th section of the Code, which declares that the defendant may be arrested where the action is for injuring, or for wrongfully taking, detaining, or converting property, must be applicable to him. The only provision that has any bearing upon the subject is that part of section 179, which declares that no female shall be arrested in any action, except for a wilful injury to person, character, or property, which did not materially change the law, the N. Y. Rev. Sts. of 1829 having provided that no female should be imprisoned in any civil action founded upon contract (2 Rev. Sts. 428); and the provision of section 114 of the Code, that when a married woman is a party, her husband must be joined with her, so far as it affects this question, was merely affirmatory of the existing law (Solomon v. Waas, 2 Hilton, 179, per Daly, J.)

may be sued alone for all tortious acts in which she has participated, whether she was a sole actor in them, or whether they were committed at the instigation of her husband;¹ and it is the same where the husband is civilly dead.² *

¹ *Vine v. Saunders*, 4 B. N. C. 102.

² *Bacon's Abr. Tit. Baron & Feme.*

* The recent statutes of New York leave unaffected the liability of the husband for the strictly personal torts of the wife. The theory upon which the husband's liability proceeds is, that the marriage subjects the person of the wife to the dominion and control of her husband, so that the commission of a tort by her is, in a degree at least, the result of his fault or omission. But in New York, in those transactions wherein the wife is now empowered to act for herself, as an unmarried woman free from the control of her husband, she is liable to the same extent as any other person would be under the same circumstances; and although her husband may be present with her, she is presumed by the law to act without his coercion or command. So, on the other hand, the husband is free from all liability for her acts in such cases, to the same extent that another person, not her husband, would be in her presence. The husband being by the law deprived of the control of his wife's actions, he is by the same law relieved from liability for her acts. Accordingly, where the cattle of a married woman trespass on land, the husband need not be made a party defendant in an action therefor (*Rowe agst. Smith*, 38 How. Pr. R. 37; s. c. 55 Barb. 417; aff'd, 45 N. Y. 230). And where a person demanded from a married woman his property in her house, which she refused to surrender, claiming to hold it on account of the debt he owed her, it was held that in thus asserting her own right or claim, she acted at her peril, like any one else under the same circumstances, and that her husband was not liable at all as husband, and could only be charged to the extent that he might have interfered (*Peak v. Lemon*, 1 Lansing, 295). In the latter case, the court commented upon the changed relations of married women effected by recent legislation in the State of New York, as follows: "The wife can now own and have the present use and enjoyment of property, both real and personal, and its rents, issues, and profits. She may carry on any trade or business, and perform any labor or services on her sole and separate account; and her earnings from her trade, business, labor, or services are her sole and separate property, and may be used and invested by her in her own name (Laws of N. Y. of 1860, ch. 90, § 2). By statute, she may also sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. The husband is not liable for any of her contracts relating to her property, trade, or business, and is exempted from costs in an action brought or defended by any married woman in her name (Laws of N. Y. of 1862, ch. 172, § 5). In regard to her separate property, she is made by our law as independent as her husband ever was in the ownership and enjoyment of his property. The earnings from her labor are her separate property. The law gives her the sole management and control of these matters, and deems her competent to act for herself, independently of her husband. Where her property, her dues, and her litigation are concerned, the law now presumes her independence and personal capacity; and in relation to the management of her estate and the collection of her debts, she is no longer presumed to be under the control or coercion of any one. In respect to her new rights and interests, the disabilities of coverture, as such disabilities existed at common law, are removed. The recent laws have surrounded her with new relations, declared her independent in certain particulars, and granted her new rights, out of which also arise new duties and obligations." In *Cassin v. Delany*, 38 N. Y. R. 178, the questions decided arose in 1855, before the statutes of 1860 and 1862 had conferred upon the wife this new capacity for trade and business on her own account.

3. *Redress for the wrongful acts of minors.*

§ 40. A father is not liable for the wilful act of his minor child, done in his absence and without his authority or approval;¹ the child being answerable for its own act, whether founded on positive wrong or a constructive tort or fraud.^{2*} But it has been held that money intrusted by a father to his infant son for a special purpose, paid by the son solely as civil damages in settlement of a trespass, cannot be recovered back by the father, although the money was paid without his knowledge or consent.³ And if the father be

¹ Tift v. Tift, 4 Denio, 175.

² Ibid.; Milton v. Bragdon, 3 Fost. 507; Bullock v. Babcock, 3 Wend. 391; Hanks v. Deal, 3 McCord, 257; Fitts v. Hall, 9 N. Hamp. 441; Lewis v. Littlefield, 3 Shepl. 233; Badger v. Phinney, 15 Mass. 359; Humphrey v. Douglass, 10 Vt. 71; *post*, § 371.

³ Burnham v. Holt, 14 H. Hamp. 367.

* In an action of trespass against minors of the ages of twelve and fourteen years, for breaking and entering the plaintiff's close and disturbing their school, it was held that as the defendants had no right to attend the school, they were trespassers in entering the school house after being notified by the prudential committee not to do so (School Dist. No. 1, in Milton v. Bragdon *et al.* 3 Fost. 507).

It has been held that an action of trespass may be maintained against an infant, although in committing the offense he acted by the command of his father. Scott v. Watson, 46 Maine, 362, was an action for breaking and entering the plaintiff's close and carrying away hay, to which the only defense made was, that the defendant was a minor acting under the authority and by the direction of his father. May, J., dissenting, said: "It is true, as a general rule, that infants who have arrived at the age of discretion, are liable for their tortious acts. But for the protection of infants, ought not the rule to be limited to cases where the infant acts under such circumstances that he must know, or be presumed to know, that the acts which he commits are unauthorized and wrong, when it appears that in the commission of the acts he was under the control and direction of his father? Will not an opposite doctrine tend to encourage disobedience in the child, and thus be subversive of the best interests of the community? Will it not also tend to subject him to embarrassment and insolvency when he shall arrive at full age? If all the members of a family under age are to be held liable in trespass or trover for the food which they eat, when that food is in fact the property of another, but being set before them, they partake of it, in ignorance of such fact, by the command or direction of the parent, and under the belief that it is his, will not such a doctrine be in conflict with the principle that the common law is intended as a shield and protection against the improvidence of infancy? While the decided cases upon this subject seem to be limited to cases of contract, is there not the same reason for extending it and applying it to cases like the one before us? In all cases which I have examined in which infants have been held liable, the proof shows acts of positive wrong, committed under circumstances where the infant must have known the nature and character of his acts. If the doctrines of the opinion are to prevail in a case like this, then the common law is but the revival of the old doctrine that the parents, by eating sour grapes, have set the children's teeth on edge. The rule that a servant who acts in ignorance of the rights of his principal is to be held liable for his acts, does not fall within the principles for which I contend."

present at the commission of the wrong, and do nothing to restrain his child, he will be responsible.¹

§ 41. Minors are presumed wanting in discretion to manage their own causes, or to appoint and instruct attorneys. Guardians are therefore to be assigned them, who shall protect their rights and be accountable. Where after judgment by default in an action of trespass against minors, it appeared that no guardian *ad litem* had been appointed for them, the judgment was reversed as to the minors, and allowed to stand as to the other defendants.^{2 *}

4. *Liability of master for wrongful acts of servant.*

§ 42. As the subject of this subdivision will hereafter again be discussed with reference to special cases,³ we must in this place be brief. It may be stated generally, that the liability of the master for the acts of his servant, depends upon whether the servant at the time, and in the particular in question, was acting under and in execution of authority from the master; in which case the master is responsible.⁴ Where an intoxicated person in an omnibus refused to get out and to pay his fare when the omnibus reached its terminus, and the conductor dragged him out violently and recklessly, and caused him to fall under the wheel of a passing cab, it was held that there was evidence for the jury of the wrongful act having been done by the servant in the course of his employment about the master's business, and that the proprietor of the omnibus was liable for the injury.⁵ † In *Weed v. The Panama R. R.*

¹ *Strohl v. Levan*, 39 Penn. St. R. 177; *post*, § 208, *note*.

² *Wilford v. Grant*, Kirby R. 114; but see *Cruikshank v. Gardner*, 2 Hill, 333.

³ *Post*, §§ 180, *et seq.*

⁴ *Greer v. Emerson*, 1 Overt. 13; *Elder v. Bemis*, 2 Metc. 599; *Hawks v. Charlemont*, 107 Mass. 414; *Howe v. Newmarch*, 12 Allen, 49; *Goddard v. Grand Trunk R. R.* 57 Maine, 202.

⁵ *Seymour v. Greenwood*, 6 H. & N. 359; 20 L. J. Exch. 189, qualifying *M'Manus v. Cricket*, 1 East, 105.

* In *Wilford v. Grant*, *supra*, the right of action was personal and the original plaintiff dead; so that the action could not have been brought *de novo*.

† The principle that subjects the master for the tortious act of his servant,

Co.¹ the question was whether the defendants were liable for the detention of the train producing damages to the wife of the plaintiff, although the detention was the wilful act of the conductor, neither authorized nor approved by the defendants. It was held that if his act was within the scope of his employment, the defendants were equally liable whether the act was wilful or negligent.*

done in the performance of his master's business and within the scope of the general authority conferred, is the same as that which subjects him for the act of his servant done by his express direction given at the time. In both cases, the maxim applies, *qui facit per alium facit per se*; and the master shall be responsible for the acts of his agent to the same extent that he would be if he personally committed the wrong. But the remedies applicable to these several injuries are different. In the former case, he is liable only in an action upon the case founded upon the negligence of the servant in the performance of the master's lawful business. Whereas, in the latter case, he is liable in an action of trespass, caused by the act of the servant. But his liability to be sued in trespass does not rest at all upon the relationship of master and servant, but upon the fact that the act complained of was done by his express direction and command; and so in reality, as well as in law, is his own act, though done through the instrumentality of another. A man shall not be made a trespasser against his will, though he may be made liable in an action on the case for the negligence of the servant while engaged in the business of the master, however contrary to the master's wishes such negligence may be. Because, he who is damaged ought to be recompensed, and a man must so use his own as to do no injury to another; and where one of two innocent persons must suffer it is more reasonable that he should suffer whose act of employing an unskilful or negligent servant was the cause of the injury, than that the other, who has been wholly in the right, should be compelled to bear a loss brought upon him through another's want of care in not attending to his own business, and in entrusting it to the carelessness of his servant (*The Thames Steamboat Co. v. Housatonic R. R. Co.* 24 Conn. 40).

The distinction between the trespass of the servant and the liability of the master for negligence arising from an act which might amount to a trespass in the servant is well illustrated in *Croft v. Alison*, 6 Eng. C. L. 614, which was an action on the case against a master for the negligence of his servant in striking the plaintiff's horses. When the horses were struck, the carriage of the plaintiff became entangled with the carriage of the defendant. The judge told the jury to find for the defendant if the entangling was the result of the moving of the plaintiff's horses which were left without a driver, and the whipping was for the purpose of extricating himself from that situation; but to find for the plaintiff in case the entangling arose from the fault of the defendant's coachman. The court, in sustaining this charge, say, if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horse of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment.

¹ 17 N. Y. 362.

* A railroad company is liable for damages caused by the detention of freight in consequence of a large number of the engineers in the employ of the company suddenly and wilfully refusing to do duty. In *Blackstock v. The N. Y. & Erie R. R. Co.* 20 N. Y. 48, the court said: "In the present case, the excuse arises wholly out of the misconduct of the defendant's servants, who wrongfully

§ 43. Where the servant at the time he commits the wrong is not acting in the master's business, and within the scope of his employment as his servant, but for some exclusive object of his own, the master will not be liable.¹* It was accordingly held that the owner of a steamboat was not liable for the wilful misconduct of the master in running her against and injuring another steamboat.²† So, where the general superintendent of the defendant's mercantile business,

refused to perform their duty, and thus deprived the defendants for the time of the ability to send forward the property; and the question is, whether the defendant's case can be separated from that of the engineers, so that it can be held that though the latter were culpable, their employers, the defendants, were without fault, and consequently not responsible to the plaintiff. This involves a consideration of the legal effect of the relations which exist between these several parties. In the first place, there was no privity between the plaintiff and the engineers. The latter owed no duty to the former, which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the employers and hold them responsible; but for a non-feasance, or simple neglect of duty, they were only answerable to their employees. The maxim in such cases is, *respondet superior*. Although the nature of the contract between the railroad company and the engineers is not disclosed in the finding, it is quite improbable that it was such that the latter might throw up their employment upon two days' notice without any legal cause. If it were of that character, the liability, moral as well as legal, would rest upon the defendants; for, in that case, they would have neglected a most ordinary precaution for securing the continuous running of their trains. Assuming, then, that abandoning their work was a breach of contract on the part of the engineers, they by that act became responsible to the defendants for all its direct consequences. The case, therefore, is one in which the actual delinquents, through whose fault the injury was sustained, were responsible to the defendants, but were not responsible to the plaintiff. This shows the equity of the rule which holds the master or employer answerable in such cases. Its policy is not less apparent.

¹ *Huzzey v. Field*, 2 Cr. M. & R. 432, 440; *Caldwell v. Sacra*, 6 Litt. 118.

² *Vanderbilt v. Richmond Turnpike Co.* 2 Comst. 479; 1 Hill, 480.

* It has been said that the implied authority of the servant is limited to those acts which the master could himself do if personally present, and that if in the performance of such acts the servant misconducts himself, the master will be liable (*Isaacs v. Third Av. R. R. Co.* 47 N. Y. 122; *Poulton v. L. & S. W. R. R. Co.* 2 L. R. Q. B. 534).

† In *Vanderbilt v. Richmond Turnpike Co.* *supra*, the judge, in the court below, refused to charge the jury that if the servant of the defendants wilfully produced the collision the defendants were not liable. The plaintiff recovered, and the judgment was reversed by the Supreme Court, which held that if the collision was wilful on the part of the defendant's servant, the defendant was not liable, referring to *Wright v. Wilcox*, 19 Wend. 343. After another trial, the case went to the New York Court of Appeals (2 Comst. 479), where the doctrine applied in the Supreme Court was sanctioned; and it was further held, that the corporation was not liable, although the wilful act producing the injury was authorized and sanctioned by the president and general agent thereof. The reason of the decision, stated in the opinion delivered by Cady, J., is in substance that a general or special agent in committing or ordering a wilful trespass to be committed acts without the scope of his authority.

suspecting that the plaintiff had stolen the goods of his employer, caused her to be arrested and searched, it was held that as authority for the arrest could not be implied from the general employment of the superintendent of the store, his employer was not liable.¹

§ 44. The law does not impute malice or a wanton and wilful trespass to the transaction of any lawful business, contrary to the wishes of the party, any more than it will impute crime. These acts may be done through the instrumentality of agents. But it must be shown as a fact that they were ordered or authorized to be done. If I command my servant to distrain, and he ride on the distress, he shall be punished, and not I.² So, if my servant, contrary to my will, chase my beast into the soil of another, I shall not be punished.³ And if my servant without my knowledge put my beasts into another's field, my servant is the trespasser, and not I; because, by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so, to this purpose, they are his beasts.⁴ If a servant employed to drive his master's carriage were to leave the carriage, and seize the horse of another whose carriage obstructed his passage along the highway, and thereby occasion an injury, his master would not be liable; because, in that matter he was not acting in the employment of his master.⁵ So, too, if a man send his horse to the shop of a blacksmith to be shod, and while the horse is standing at the door, the servant of the blacksmith, without the knowledge of his master, beat the horse, and thereby injure him, the servant alone will be responsible.⁶ *

§ 45. We are not merely to inquire who is the general

¹ *Mali v. Lord*, 39 N. Y. 381.

² *Noy's Maxims*, ch. 44.

³ *Bro. Abr. Trespass Pl.* 435.

⁴ *2 Roll. Abr.* 553.

⁵ *Church v. Mansfield*, 20 Conn. 284.

⁶ *Ibid.*; and see *Lamb v. Palk*, 9 C. & P. 629.

* This doctrine does not militate against the cases in which a master has been holden for the mischief arising from the negligence or unskilfulness of the servant who had no purpose but the execution of his master's orders.

owner of real estate in ascertaining who is responsible for acts done upon it injurious to another, but who has the efficient control; for whose account, at whose expense, under whose orders, is the business carried on, the conduct of which has occasioned the injury.¹ Where in an action for trespass to land it appears that the defendant himself did not trespass thereon, it must be proved that the relation of master and servant subsisted between the defendant and him who committed the acts.² And it may be observed that one who is employed to oversee and take the entire charge of work requiring peculiar skill, is so far a servant that his employer is liable for his misfeasance.³ But if it appear that the acts were not done by the defendant, or by his order and direction, or at his expense, or for his benefit, and though done on land of which he was the general owner, that it was not land of which he at the time had the possession or control, he will not be liable. *Earle v. Hall*⁴ was an action of trespass for entering the plaintiff's close and undermining a division wall between the houses of the plaintiff and defendant. It was proved that the defendant entered into a contract under seal with one Gilbert to convey land to Gilbert, that Gilbert covenanted to build a brick house upon the land, and to pay for the land by the first of October following, and that while the agreement was in force the workmen of Gilbert, in preparing to build the house, undermined the wall of the adjoining house belonging to the plaintiff, which was the trespass charged. It was held that the plaintiff could not recover.

§ 46. The general principle to be extracted from the cases in regard to the use of real property is, that the owner of real estate, either absolutely or for the time being—he who has the management and control, and takes the benefit and profit of the estate; he at whose expense, and on whose account the business is conducted—shall be responsible to third persons for injury caused by those who are carrying on

¹ *Earle v. Hall*, 2 Metc. 353.

² *Morgan v. Bowman*, 22 Mo. 538.

³ *McGuire v. Grant*, 1 Dutcher, 356.

⁴ *Supra*.

the business by which they are damnified ; and this, whether the persons thus employed and engaged are working on wages or by contract, and whether they are employed directly by the principal or by a steward, agent, or manager having the superintendence of his estate. Several principles of law seem to be referred to as the source of this responsibility. One is, that he who does an act by another does it himself. Though not the work of his hands, it is the result of his will. His mind, his intent, and his purposes are the efficient cause of the operations conducted by others. It is therefore he, who, in the conduct of his own business, causes the damage complained of, and it is of him that redress shall be obtained.

§ 47. Another principle is, that every one shall so use his own property as not, in the management of it, to hurt that of another. Having the power to determine what agents shall be employed, what business shall be carried on, upon the estate of which he has either the ownership or the enjoyment and possession, it is alike the dictate of justice and public policy that he shall be responsible for the conduct of those whom he may employ or dismiss, and whose movements he has the power to direct. Accordingly, if an employee, while cutting down trees by his employer's orders, and in the scope of his employment, trespass upon another's land, the employer is liable therefor.¹ Where A. voluntarily undertook to help B. make a brush fence, and was suffered by B. to proceed in his service without objection or any other restriction, except to be careful not to cut trees standing on the plaintiff's land, which, however, he did for want of proper information, the act being done in the presence of B. and for his benefit ; it was held that B. was liable in trespass for the acts of A.² The responsibility of the employer has been extended to the acts of subagents. In *Bush v. Steinman*,³ the defendant had pur-

¹ *Luttrell v. Hazen*, 3 Sneed, 20.

² *Hill v. Morey*, 26 Vt. 178.

³ 1 Bos. & Pul. 404.

chased a house near a road and contracted with a surveyor to repair it for a stipulated sum. He employed a carpenter, the carpenter a bricklayer, and the latter a lime burner; and the act which caused the injury to the plaintiff was done by the lime burner's servant in laying a heap of lime in the road. At the trial, Eyre, C. J., thought the relation was too remote, and that the action would not lie. But after argument, he concurred with the other judges in the contrary opinion. The ground he put it on was this: Here, he says, the defendant, by a contractor and by agents under him, was repairing his house; the repairs were done at his expense, and the repairing was his act. Heath, J., founded his opinion upon the single point that all the subcontracting parties were in the employ of the defendant. And Rooke, J., stated the general proposition that he who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. In the case of a loss by the misconduct of a servant, the party injured has no means of ascertaining whether due caution was exercised by the master in employing him or prudence in retaining him; and in the case of a controversy between the master and the servant as to which was the real delinquent, the owner of the property must generally be without the necessary evidence to charge the liability upon the master. The rule which the law has adopted, by which the master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons intrusted with the property of others. The motive of self-interest is the only one adequate to secure the highest degree of caution and vigilance by the master.

§ 48. But where, for aught that appears, the trespasses were voluntary on the part of the defendant's employees, and unconnected with the employment, no presumption arises that the defendant authorized the unlawful acts. Nor can an inference be drawn against him by reason of his omission

to forbid the acts, in the absence of proof that he knew that his employees had committed or intended to commit them. In an action of trespass *quare clausum fregit*, the judge charged the jury that, if they should find that the defendant employed workmen to cut and convert into coal wood upon his land, and deliver the coal at his furnace; and the workmen, in order to transport the coal to the furnace, cut and made roads on the plaintiff's land, and transported the coal over the same with the defendant's teams and carts, and delivered the coal at the furnace for the defendant's benefit, the presumption was, that the acts of the workmen were done by the authority and direction of the defendant, unless he showed that he had forbidden the workmen from going on to the plaintiff's land and doing the acts complained of. But a verdict having been found for the plaintiff, the Supreme Court granted a new trial for misdirection.¹ In a case in New Hampshire, the following instruction was held erroneous: "That if, after the line was ascertained and well known to the defendant, the defendant went upon the plaintiff's land and hauled away the timber for his own use, that would, in law, be an affirmance of what his servant had done in cutting over the line, and render the defendant answerable for the act of the servant, in the same manner as if he had knowingly and intentionally committed the act himself." Carrying the timber away might have had some tendency to have convinced the jury that the defendant was cognizant of and approved the original cutting; but such would not have been the necessary legal effect of the evidence as a rule of law; and most clearly, an affirmance of the cutting in this manner would not have altered the original nature of the act, so as to have rendered that wilful and malicious that was, originally, an unintentional and accidental trespass. Could it have had any bearing in this point of view, it would only have been for the consideration of the jury. But the evidence was

¹ Church v. Mansfield, 20 Conn. 284.

not submitted to the jury in this manner, but was held to be conclusive against the party as a matter of law.¹

5. *Liability of principal for wrongful acts of agent.*

§ 49. As the law upon this subject is founded upon the same analogies as exist in the case of master and servant, but little need be said under this head; especially as most of the reported decisions relate not to positive wrongs committed by agents, but to nonfeasances or mere omissions of duty. It may be observed that the principal is liable in a civil suit to third persons for the torts of his agent in the course of his employment, although the principal did not authorize, or indeed know, of such misconduct, or even if he forbade the acts or disapproved of them.² This rule of liability is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy, and that it is more reasonable, where one of two innocent persons must suffer from the wrongful acts of a third person, that the principal, who has placed the agent in the position of trust and confidence, should suffer than a stranger. All that is necessary to render the principal liable for the malfeasance or torts of the agent is, that the tort be committed in the course of the agency;³ not that the agency authorized it, but, as it is expressed by Paley,⁴ that the employment afforded the means of committing the injury. The principal is not, however, liable in trespass for the wrongful acts of his agent in matters beyond the scope of the agency, unless he has expressly authorized them to be done, or has subsequently adopted them for his use and benefit, with notice of the illegality.* Where a broker, under a warrant from the land-

¹ Batchelder v. Kelly, 10 New Hamp. 436.

² Story on Agency, §§ 308, 452, 456; Perkins v. Smith, Sayer, 40; Lane v. Cotton, 12 Mod. 472; Hunter v. The Hudson River Iron Co. 20 Barb. 493; Phila. R. R. Co. v. Derby, 14 How. 468; Southwick v. Estes, 7 Cush. 385.

³ Croft v. Alison, 4 Barn. & Ald. 590; Puryear v. Thompson, 5 Humph. Tenn. 397; Harris v. Nicholas, 5 Munf. 483; Brown v. Purviance, 2 Harris & Gill, 316; Kerns v. Piper, 4 Watts, 222.

⁴ Dunlap's Paley Agency, p. 306.

* When a general agent commits or orders a wilful trespass to be committed,

lord, authorizing him to distrain the goods and chattels of the tenant, seized a fixture which was afterward sold and the proceeds paid to the landlord, it was held that the receipt of the proceeds did not make the landlord a trespasser, it not being shown that he was aware of the illegal seizure.¹

6. *Responsibility of sheriff for the wrongful acts of his deputy.*

§ 50. An action of trespass may be maintained against a sheriff for the wrongs of his deputy, although no immediate command, consent or recognition by the sheriff of the act alleged to be a trespass be proved;² and without averring the misfeasance of the deputy; the law, for the sake of a more convenient and effectual remedy, proceeding upon the assumption that the act of the deputy is the act of the sheriff. In *Pratt v. Bunker*,³ it was contended that the trespass proved was committed by one Williams, and that there was no proof that, in committing it, he was acting under color of legal process, or as deputy of the defendant. But it was held that, as the plaintiff had proved that Williams took the property and sold it at auction, and that he was then the deputy of the defendant, taken in connection with the defendant's brief statement that such acts were done by virtue of legal process against one Rines, who was the owner of the property, it was *prima facie* sufficient to maintain the action, and to call on the defendant to sustain his justification. Where a trespass has been committed by the deputy, the party aggrieved has his election to sue either the sheriff or deputy; but he cannot sue both. If he chooses to bring an action against the deputy, and proceeds to judgment and execution against him, there can be no good reason for allowing him afterward to resort to the sheriff.⁴*

he acts without the scope of his authority, the same that a special agent would (*Vanderbilt v. The Richmond Turnpike Co.* 2 N. Y. 479).

¹ *Freeman v. Rosher*, 18 L. J. Q. B. 340.

² *Grinnell v. Phillips*, 1 Mass. 530; *post*, §§ 502, 503.

³ 45 Maine, 569.

⁴ *Taft v. Metcalf*, 11 Pick. 456; *Campbell v. Phelps*, 17 Mass. 244.

* In *Grinnell v. Phillips*, *supra*, the court said: "The law undoubtedly is

7. Action against corporations.

§ 51. It has sometimes been said, that an action of trespass cannot be maintained against a corporation; that if the members of a corporation, though ever so formally assembled, do, or agree to do, an act which is illegal and wrong, the law will not consider it the act of the corporation, but of the acting individuals in their natural capacities; that as such act binds no one, so it authorizes no one to carry it into effect, and if an injury ensue, all who act in the business are volunteers therein.¹ But it has long been held, that although corporations can only act through the instrumentality and agency of others, yet that they are liable in trespass for torts authorized or commanded by them.² * In an early case in

that, in trespass, all are principals, as well those who command or procure, as those who, being present, are the immediate agents in the act complained of. Therefore, in declaring in actions of this nature, it is never necessary to distinguish between the adviser, the companions, and the agent, for each and all are answerable severally and jointly, and all as principals. That this is the legal effect, where the proof is of a direct command, is not disputed. That an implied command has the like operation, appears by the legal doctrine respecting masters and servants. It seems to be well established, by ancient and modern decisions, that the master is liable for every act done by the servant in the course of his employment; the law implying, from their relation, and from the circumstances of the act, that it is done by the procurement and command of the master. The law views the relation of a sheriff and his deputies in the same light. In official acts, they are not distinguishable from each other. The relation of command and agency is more intimate and direct; and the responsibility of the principal or master for the acts of the servant is maintained upon stronger reasons of public policy and regard to the public welfare, than in any case which can be supposed within the common relation of master and servant."

¹ Wilcox v. Sherwin, 1 Chipman, 72; Foote v. Cincinnati, 9 Ham. 31.

² 6 Vin. Abr. 288, 289; Main v. Northeastern R. R. Co. 12 Rich. 82; Lyman v. The White River Bridge Co. 2 Aiken, 255; Lee v. The Village of Sandy Hill, 40 N. Y. 442; Conrad v. The Village of Ithaca, 16 Ib. 158; Howell v. The City of Buffalo, 15 Ib. 512; Hickok v. The Trustees of the Village of Plattsburgh, 16 Ib. 161, note; Weet v. The Trustees of the Village of Brockport, Ib. 161; Storrs v. The City of Utica, 17 Ib. 104; post, §§ 532, 937.

* In Lyman v. The White River Bridge Co. *supra*, the action was trespass for breaking and entering the plaintiff's close, and erecting thereon a bridge, and the general question was whether an action of trespass would lie against a corporation. The court, in holding the affirmative said: "It is urged that as a corporation is an artificial being, intangible, and existing only in contemplation of law, it cannot, as such, commit or be sued for a tort, but the action must be brought against each person who committed the tort by name; and this proposition appears not only to receive countenance, but support from some of the authorities. But on looking into the books, we find many cases, in which actions on the case arising *ex delicto*, where the plea is *not guilty*, have been maintained against corporations at common law. If an action on the case will lie against a corporation for a tort, there seems to be no good reason why trespass will not

Massachusetts, Chief Justice Parsons, in delivering the opinion of the court, said: "That a *capias* does not lie against a corporation is evident; but that no action of trespass lies, is questionable. For it is agreed that a corporation may be fined on indictment, and the fine levied by distress; and why may not a corporation be amerced, and the amercement be collected in the same manner?" And he proceeds to cite a number of ancient cases, in which trespass was held to lie against a corporation; such as trespass for distraining the plaintiff's cattle until he paid a toll, which he was not bound to pay; trespass for disturbing the plaintiff in the profits of his liberties, and for disturbing him in holding a leet; and in an assize, as a disseizor with force. He concludes by saying, that it is very clear from the examination of the old books, that some actions of trespass, might, at common law, be maintained against aggregate corporations.¹

also lie. The distinction between the two actions is not, whether the act complained of was accompanied with force, or whether there was an intent to do the injury; but whether the injury was the direct and immediate effect of the act complained of, or was the collateral consequence of some act previously done. If a corporation is liable in case, for consequential damages proceeding from an act authorized by them, they may and ought to be liable in *trespass* for an immediate or direct injury arising from an act authorized by them or done by their command. Indeed, there seems to be no difference, either on principle, or on technical grounds, as to the liability of a corporation in actions of the case *ex delicto*, and actions of trespass. In reason, and on principle, if a man is injured by any tortious act of a corporation, done by its authority, he ought to have his remedy by action against them, as much as against a natural person. In actions in form *ex delicto*, as case, trover, trespass, &c., the rule is that the action may be brought either against the person who actually committed the injury, or against him who commanded or authorized it. And it is a general principle that a corporation is liable for the acts of its servants, agents or officers while acting within the limits of the authority delegated to them by the corporation, or acting under its command. It is a fallacy to say, that because a corporation has no natural existence or physical powers, they cannot commit a trespass. It is true, they cannot commit a trespass but through the instrumentality of others; neither can they make a contract, or do any other corporate act whatever, but through the agency of others. Considering the numerous incorporated companies, established among us for various purposes, having extensive powers, and carrying on extensive business, it seems necessary that this principle should be adopted; for without it, the party injured might, in many cases, be without any adequate remedy."

A demurrer to a declaration charging a corporation in trespass, admits that an authority to do the acts complained of, was given by the corporation, either under their corporate seal, or by their corporate vote (*Ibid*).

¹ Riddle v. Props. of Merrimack Locks & Canal, 7 Mass. 169.

8. *Liability of partners.*

§ 52. Partners are liable for a trespass by themselves, or their agents, employees, or servants in the legitimate conduct of the partnership business; or if the trespass be done by the direction of their agent acting within the scope of his powers; or by workmen, under the same qualification while in the employment of the firm.¹ But a partner cannot make his copartners responsible for a trespass committed by him, unless the wrong-doer was acting within the proper scope and business of the partnership, or the firm afterward take advantage of, and adopt the transaction.²

9. *Action by and against executors.*

§ 53. An action of trespass will not lie at common law for or against executors for injuries done to or by their testators.³ But the common law doctrine, that torts die with the person, has been largely innovated upon by modern legislation, in consequence of its harsh and unjust operation in many cases, so that now, in some of the States, hardly any cause of action for damages, either to person or property, is allowed to be defeated by the death of either the party injured, or the party liable.*

¹ McKnight v. Ratcliff, 44 Penn. St. R. 156.

² Petrie v. Lamont, Car. & M. 93; Taylor v. Jones, 42 N. Hamp. 25.

³ Middleton v. Robinson, 1 Bay, 58; Gordon v. Robinson, 1 Browne, 325; see *post*, §§ 533, 939.

* The New York Revised Statutes (vol. 3d, 5th ed. p. 746) provide that for wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the executors or administrators of the wrong-doer after the death of the latter. But the foregoing does not apply to actions for assault and battery and false imprisonment. When the wrongful act causes the death of the person injured, although occurring under such circumstances as amount in law to a felony, the right of action survives to the personal representatives; but the action must be commenced within two years, and the amount of recovery cannot exceed five thousand dollars (Ib. p. 589).

In Vermont, among other statutes upon this general subject, there is one providing that in actions to recover damages for any *bodily hurt or injury*, the death of either party shall not defeat the action, but the same may be prosecuted by or against the representative of such deceased party. In Whitcomb v. Cook, 38 Vt. 477, which was an action brought by an administrator for an alleged unlawful arrest and imprisonment by the defendant, the question arose whether it was an action within the foregoing statute, for a bodily hurt or injury. It was

10. *Liability of persons whose authority is derived from statute.*

§ 54. It is a general rule that whenever a person justifies under any authority whatever, he must show every matter and part of the authority under which he justifies. This rule is especially applicable to persons whose powers are solely derived from statute. Justices of the peace have no common law jurisdiction in civil cases. They are confined strictly to the authority which the statute has conferred, and can take nothing by implication. So far as regards mere matters of form, and the regularity of their proceedings, when parties are properly before them, their acts will be viewed with liberality. But if they proceed in a matter not within their cognizance, or without having acquired jurisdiction over the party in the forms prescribed by law, any judgment which they may render will be absolutely void. This doctrine is not peculiar to courts held by justices of the peace in civil cases, but applies to all courts and officers

held that the statute embraced every case of physical injury to the person caused in any unlawful manner. The court said: "We think the clear and plain intent of the statute was to make all actions survive when the cause of action was for a physical injury to the person, caused in any unlawful manner. The word *bodily* was used so as to carefully exclude certain actions which are sometimes, by law writers, included in the class of actions for personal injuries, such as actions of slander, and for malicious suits or prosecutions. The defendant claims that the language of this act should be strictly construed, as an act in derogation of the common law. That principle is entirely sound, and is recognized by the courts in all cases to which it properly applies, when some common law right is taken away. But it is also a settled rule in the construction of statutes, that remedial statutes are to be liberally construed, which, in our judgment, is the proper rule to be applied to this statute. It is made to preserve an already accrued and existing right from being lost by this harsh and technical rule of the common law. One may have suffered great loss and wrong by the unlawful and wicked act of another. If the wrong-doer dies, is it not just and right that the injured party should be recompensed out of the estate of the perpetrator? Or, if the injured party dies, ought not the successors to his rights and property to be entitled to the recompense, rather than that the wrong-doer should escape all the consequences of his act? But without resorting to any other rule than the plain and obvious meaning of the language of the statute, we are satisfied it covers the case of an unlawful arrest and imprisonment of the plaintiff's body; and, in our view, it would be monstrous to hold that an action for a slight blow or kick survived, and a claim for being unlawfully incarcerated in a prison, however long, did not, but died with the person of the plaintiff."

In Wisconsin (under Rev. Sts. ch. 135, sects. 12, 13), an executor or administrator may maintain an action for injuries done to a married woman which caused her death (*Whiton v. Chicago &c. R. Co.* 21 Wis. 305).

exercising a special and limited jurisdiction. They must pursue their authority, or their acts will be void. The principal distinction between courts of general and those of limited jurisdiction is, that, in the one case, jurisdiction will be presumed until the contrary appears, while, in the other, no such presumption is indulged; but they must show their authority in every case. In pleading the judgment of a superior court, it is enough to say that judgment was rendered; and it will lie on the other party to show a want of power. But in pleading the judgment of an inferior tribunal, the authority to decide, as well as the judgment, must be alleged.¹ Where a statute prohibits jurisdiction, or where a prohibition is necessarily implied, by its being vested exclusively in another tribunal, no consent can give jurisdiction.²

§ 55. What is true of inferior courts, is also true of the doings of corporate bodies erected by law for private and local purposes. Such corporations, though they derive their existence and powers from public laws, are created for special objects. Their organization, and the proceedings of those who claim to act under them, cannot be known judicially until proved, and must be shown to be in pursuance of the law which creates and authorizes them, otherwise they are totally void.³

§ 56. The principle is universal that whenever any persons assume to act under a special and limited power conferred by law, their doings may be avoided by showing that they had no jurisdiction, or that they exceeded the limits of their authority, and that they thereby became trespassers.⁴

¹ *Hoose v. Sherrill*, 16 Wend. 33; *Barrett v. Crane*, 16 Vt. 246; *Evertson v. Sutton*, 5 Wend. 281; *Batchelder v. Currier*, 45 N. Hamp. 460; *Smith v. Knowlton*, 11 N. Hamp. 191; *Kittredge v. Emerson*, 15 N. Hamp. 227; *Sanborn v. Fellows*, 22 Ib. 473; *State v. Richmond*, 26 Ib. 232; *Bigelow v. Stearns*, 19 Johns. 39; *Allen v. Gray*, 11 Conn. 95; *Smith v. Rice*, 11 Mass. 507; *post*, § 359.

² *Batchelder v. Currier*, *supra*; *People v. White*, 24 Wend. 520; *Heyer v. Burger*, 1 Hoffman's Ch. R. 1; *Blatchley v. Moser*, 15 Wend. 215.

³ *Bates v. Hazeltine*, 1 Vt. 81.

⁴ *Cate v. Cate*, 44 N. Hamp. 211; *Sanborn v. Fellows*, 22 Ib. 473; *State v. Richmond*, 26 Ib. 236; *Blood v. Sayre*, 17 Vt. 609; *post*, § 362.

Where, therefore, the common council of a city directed the mayor to sign and issue a warrant for the collection of an illegal assessment, which he accordingly did, it was held that he was liable as a trespasser for property taken under the warrant.¹ In *Robinson v. Dodge*,² the trustees of a school district were held trespassers, because they issued their warrant to collect a tax, when the only error was that the district meeting had not specified the amount of the tax to be raised, that being required by the statute.

§ 57. Justices of the peace have always been held responsible to individuals for all the injurious consequences arising from every illegal act they may have done, either in the execution of their ministerial powers and duties, or in the adjudication of causes over which they have no jurisdiction; and all who directly and knowingly participate with them are equally liable.³ In *Wallsworth v. McCullough*,⁴ a justice of the peace was held to be a trespasser who issued a warrant in a case of bastardy without the application of an overseer of the poor, though the overseer subsequently ratified the act. Where the plaintiff procured a second execution to be issued by a justice, after the first had been indorsed satisfied, upon the suggestion that the first execution was lost or destroyed, it was held that the justice and plaintiff were both trespassers.⁵ *Schermerhorn v. Tripp*⁶ was an action of trespass against a justice of the peace, a constable, and the plaintiff in a suit before the justice, for taking goods under an execution issued by the justice, to which the defendants joined in pleading the general issue. Judgment having been rendered for the defendants in the Common Pleas, it was reversed by the Supreme Court, on

¹ *Williams v. Brace*, 5 Conn. 190.

² 18 Johns. 351.

³ *Sullivan v. Jones*, 2 Gray, 570; *Clarke v. May*, *Ib.* 410; *Briggs v. Wardwell*, 10 Mass. 357; *Percival v. Jones*, 2 Johns. Cas. 49; *Russell v. Perry*, 14 N. Hamp. 152; *Kennedy v. Terrill*, *Hardin*, 490; *Poult v. Slocum*, 3 Blackf. 421; *Rembert v. Kelly*, *Harper*, 65; *Alexander v. Hoyt*, 7 Wend. 89.

⁴ 10 Johns. 93.

⁵ *Lewis v. Palmer*, 6 Wend. 367.

⁶ 2 Caines, 108.

the ground that the justice was disqualified and had no jurisdiction, for the reason that he was a tavern-keeper, and that, as the others united with him in pleading the general issue, they were all trespassers.*

* The New York statute provides that no justice of the peace being an innholder or tavern-keeper in fact shall have jurisdiction; but that if a judgment shall have been rendered by him before he became disqualified, he may issue execution.

When penalties are to be recovered by information before justices of the peace, under a statute which directs that the justices shall summon the person against whom the information is exhibited to appear and plead to, and to attend the hearing of the information, at a time and place named in the summons, such summons to be served "ten days at the least" before the time appointed; there must be ten clear days between the service and the day of hearing; and where the conviction showed on its face that the party was convicted *ex parte* on default of appearance to a summons appointing too early a day, it was held that such conviction was no defense to an action of trespass for enforcing it (*Mitchell v. Foster*, 12 Ad. & E. 472; 9 Dowl. P. C. 527).

Case *v. Shepherd*, 2 Johns. Cas. 27, was an action of trespass *quare clausum fregit*, for treading down the plaintiff's grass, and cutting and carrying away grain. It appeared that the plaintiff was indicted for trial before the defendant, who was a justice of the peace, under the act to prevent forcible entries and detainers; that the plaintiff, having pleaded to the indictment, obtained, before trial, a *certiorari* from the Supreme Court to remove all the proceedings, which he delivered to the defendant, who, notwithstanding, proceeded to try and convict the plaintiff; and that the plaintiff was thereupon turned out, and one Bull put into possession of the premises. By the court: "There can be no doubt that the delivery of the *certiorari* to the justice superseded his powers, and rendered all subsequent proceedings before him *coram non iudice* and void. As the magistrate holds a court of special and limited jurisdiction, and proceeded after his power was taken away by the *certiorari*, he became a trespasser, and is liable as such."

Under the statute of Massachusetts of 1783, ch. 58, § 1, the party obtaining judgment in a civil action is entitled to have his execution thereon at any time after the expiration of twenty-four hours, and within one year next after the entering up of such judgment. In *Briggs v. Wardwell*, 10 Mass. 356, the question arose, under the foregoing statute, whether an action of trespass would lie against a justice of the peace who issued execution in a civil action in less than twenty-four hours after judgment. It was held that it would. Jackson, J., delivering the opinion of the court, said: "We are of opinion that the issuing of the execution in this case was a ministerial act of the defendant, for which he is liable to the party injured, in like manner as the clerk of any other court would be who should, without any express order of the court, issue an execution contrary to the provisions of the statutes. As far as respects this question, it is as if there were no judgment subsisting until the expiration of the twenty-four hours. There is nothing on which an execution could lawfully issue; and the defendant might as well have issued it before judgment was rendered, or after the expiration of the year."

In *Kendall v. Powers*, 4 Metc. 553, the doctrine laid down in *Briggs v. Wardwell*, *supra*, that a magistrate is liable to a party in a civil action for damages resulting to him from the illegal issuing of a final process upon a judgment, was considered, both by the counsel of the parties and by the court, so familiarly and firmly established, that it was not even adverted to as presenting any possible question (*See Sullivan v. Jones*, 2 Gray, 570).

Although the magistrate has jurisdiction of the offense, and a right to issue process against the person, yet if such process be issued without complaint, it is

§ 58. When a magistrate issues process without authority of law, the ground of his liability is, that he has given a personal direction or request to do the acts which the process directs to be done. His responsibility is therefore limited to such acts as are done according to the mandate of the instrument. In determining whether the acts were done in pursuance of the process, the same considerations are applicable which would have belonged to the case, had the process been entirely legal. In the case of an attachment, it will be considered a command to attach, and not to sell property; and to attach the property of the defendant, and not of another. It is a direction to the particular officer, or class of officers named, and not a different one; and if a person not mentioned or referred to in it, undertake to execute it, he is considered not only as having volunteered, but as having intended to act officiously, without the consent of the magistrate, and against his express direction, as contained in the process. The doings of one so volunteering, are, by no legal intendment, the acts of the magistrate, as they were not performed by his assent, counsel, or procurement.¹

§ 59. Where a statute requires a justice of the peace before issuing an attachment to have satisfactory proof offered him of the departure or concealment of the debtor, with intent to defraud his creditors, or to avoid being personally served with process, a mere error in judgment as to the legality of the proof offered, will not make the magistrate a trespasser by issuing the attachment. But such proof in order to give the justice jurisdiction, must be

void, and all concerned are trespassers (*Allen v. Gray*, 11 Conn. 95, per Bissell, J., citing *Grumon v. Raymond*, 1 Conn. 40; *Slocum v. Wheeler*, *Id.* 452; *Tracy v. Williams*, 4 Conn. 113; *Martin v. Marshall*, Hob. 63; *Perkins v. Proctor*, 2 Wils. 386; *Morgan v. Hughes*, 2 Term R. 225; *Smith v. Bouchier*, 2 Stra. 993; *Com. Dig. Tit. Trespass, C, 1*; *Bac. Abr. Tit. Trespass, D, 2*).

In Indiana, a justice of the peace who causes the goods of an absconding debtor to be attached without the previous filing of a bond, according to the statute, and the party who procures the writ to be issued are trespassers (*Barkeo v. Randall*, 4 Blackf. 476).

¹ *Merritt v. Read*, 5 Denio, 352.

at least colorable. He cannot act upon his own knowledge or mere belief on the subject, however well founded. Proof, in the sense in which it is here used, means legal evidence, or such species of evidence as would be received in the ordinary course of judicial proceedings. In *Vosburgh v. Welch*,¹ it appeared that the evidence upon which the justice acted did not amount even to the information of the constable, that the debtor had departed the county, or was concealed with intent to defraud his creditors, or to avoid being served with process. The court remarked that the justice might have believed the fact upon mere report, or the information of some person in whom he had confidence; but that that was not satisfactory proof within the meaning of the law; that the return of the constable on an execution against the debtor, was not such proof; and that as the justice must be considered as having issued the attachment without any proof whatever of the departure or concealment, and therefore without authority, he was liable as a trespasser.

§ 60. If a magistrate have jurisdiction, his acts, though erroneous, will not make him liable.² Under a statute conferring upon a justice of the peace jurisdiction to issue a summons as the first process in the commencement of a suit before him, when the defendant is a freeholder or an inhabitant, having a family within the county where the justice resides, if a summons be issued in a case in which it is not the appropriate process, the objection to be available to the defendant in such process, must be taken before the justice; and if he errs in his decision, his general power will protect him and all officers concerned in the execution of the process from being treated as trespassers. And where upon a complaint made before a justice of the peace, for an assault and battery, the warrant was irregular in form, it

¹ 11 Johns. 175; but see *Collins v. Ferris*, 14 Ib. 246.

² *Adkins v. Brewer*, 3 Cowen, 206; *Blood v. Sayre*, 17 Vt. 609; *Lancaster v. Lane*, 19 Ill. 242; *Houlden v. Smith*, 14 Jur. 598; 19 L. J. 170; *Stanton v. Schell*, 3 Sandf. 323.

was held that as the magistrate had jurisdiction, and everything was right except the process, the defendant by not making his objection, while before the magistrate, waived all objection.¹ *

11. *Action in the case of joint wrong-doers.*

§ 61. We have seen² that where an immediate injury is committed by the co-operation of several, they are all trespassers; and as any one of them is liable for the acts of all, it follows that they may be sued either jointly or severally.³ †

¹ Com. v. Henry, 7 Cush. 512.

² *Ante*, § 23; and see *post*, § 212.

³ Allen v. Craig, 1 Green. 294; *post*, § 222.

* Horton v. Auchmoody, 7 Wend. 200, was an action against a justice of the peace for the sale of the property of the plaintiff on an execution issued under a judgment rendered by the defendant after an unauthorized adjournment. The Supreme Court held that the justice was not liable as a trespasser, and that the judgment of the Common Pleas which was for the plaintiff, must be reversed. Savage, Ch. J., delivering the opinion, said: "The argument for the plaintiff in error is, that though the justice once had jurisdiction, he had lost that jurisdiction; that the adjournment being an act not authorized by law, the cause was at an end, and any further proceeding was without jurisdiction, as much so as a judgment would be without any previous process. It must be conceded, that so far as the parties litigant before the justice in that suit are concerned, this court have considered an unauthorized adjournment an end of the suit; but where a remedy is sought against a justice, the principle of judicial irresponsibility should be interposed as far as it is applicable. It has been held in some of the cases, that where the plaintiff refuses or neglects to appear upon the coming in of the jury with their verdict, it is irregular to receive the verdict; yet in such a case, we held that a judgment rendered upon a verdict so taken was not void but voidable; that the justice having jurisdiction of the subject-matter and the person, had power to enter a judgment of discontinuance; that the plaintiff was for that purpose at least, within the jurisdiction of the justice, and that a judgment in his favor, though irregular, was not void. Where the justice has no jurisdiction, a judgment rendered by him may be attacked collaterally, want of jurisdiction in the court may be shown, though if jurisdiction be conceded, the judgment cannot be inquired into. In this case, the justice had jurisdiction of the cause, of the parties, and of the question of adjournment. His error was an error of judgment, and according to the decisions above referred to, the consequence of that error, was, that the cause was discontinued as between the parties, and any judgment entered after such adjournment, was liable to be reversed. But I believe, that none of the cases consider such a judgment, a proper subject of inquiry as to its merits in another tribunal. If the justice is liable in this case, it must be conceded that such liability arises from a judicial act, which is contrary to established principles."

† In Henly v. Broad, 1 Leon. 41, Henly brought trespass against Broad, and declared that he, together with a certain J. S., broke the plaintiff's close. The defendant pleaded to issue, and it was found for the plaintiff. It was objected in arrest of judgment, that the count was not good, because it appeared from the plaintiff's own showing that the action ought to have been brought against another not made a party defendant. Judgment was, however, given for the plaintiff, and upon a writ of error to the Exchequer Chamber, it was affirmed on the principle that it was cured after verdict by the statute of jeofails. The

If the action be joint, there can be no separate estimate of the injury committed by each;¹ but a general verdict for the plaintiff will apply to all of the defendants.² Actions may, however, be depending against each trespasser severally at the same time, for the trespass committed by them jointly; and the pendency of one is not pleadable in abatement of the other.³ Neither is a recovery against one a bar to an action against his cotrespasser,⁴ though the plaintiff can have but one satisfaction.⁵ *

ground of this decision was that a trespass is in its nature the separate act of each individual, and that, therefore, the plaintiff has his election to sue all or any number of the parties. Serjeant Williams (1 Saund. 291), in his notes, after speaking of the case of *Henly v. Broad*, and several other cases which recognize the principle that if the plaintiff show that the *tort* was done jointly by the defendant and another, the suit shall abate, says that there is no ground for the distinction, and that it was always held that if the declaration only stated that the defendant, together with certain persons unknown, did the wrong, the action should not abate.

In *Rose v. Oliver*, 2 Johns. 365, a motion was made in arrest of judgment because one Russell had been returned not found on the *capias*, and was complained of, together with the other two defendants, as having committed the trespass. The plea was put in by the two defendants returned taken, and the verdict found them guilty of the trespass alleged. It was contended that the plaintiff could not have judgment against them, as it appeared by his own showing that Russell, whom he had made a defendant, had not been brought into court or answered. It was held that the trespass being joint or several, the plaintiff was at liberty to proceed against one or more of the defendants, and that the declaration, though informal, was cured by the verdict. Spencer, J., in delivering the opinion of the court denying the motion, said: "The method of declaring was probably adopted under the notion that the statute authorizing proceedings against such joint debtors as were returned taken extended to this case; an idea certainly very inaccurate. The effect of this mode of declaring we conceive to be the same as complaining that A. and B. did a trespass *simul cum quodam* C. D.; because in neither case is the person not taken a party to the suit. There is no reason why, contrary to the established principle that trespassers are joint or several at the election of the injured party, the plaintiff should be obliged to make all the trespassers parties, even if he know them. It can produce no injury to the defendant, because on the trial there would be no evidence of the separate and distinct acts of the trespassers. As to the idea that a contribution could be enforced, and that, therefore, all known to the plaintiff should be made parties, it is enough to say that this is not a case of contribution; and if all the damages were levied on one of the two defendants found guilty, he would be remediless."

¹ *Gilpatrick v. Hunter*, 24 Maine, 18; *Brown v. Allen*, 4 Esp. R. 158; *Wynne v. Anderson*, 3 C. & P. 596; but see *Johnson v. Hannahan*, 3 Strobb. 425.

² *Cane v. Watson*, 1 Morris, 52.

³ *Sheldon v. Kibbe*, 3 Conn. 214; *Jones v. Lowell*, 35 Maine, 538.

⁴ *Marsh v. Berry*, 7 Cowen, 344; *Sheldon v. Kibbe*, 3 Conn. 214; *Day v. Porter*, 2 M. & Rob. 151; *Knott v. Cunningham*, 2 Sneed Tenn. R. 204.

⁵ *Wright v. Lathrop*, 2 Ham. 33; *Hawkins v. Hatton*, 1 N. & M. 318; *McGehee v. Shafer*, 15 Texas, 198; *Page v. Freeman*, 19 Mo. 421.

* Until the case of *Brown v. Wooton*, Cro. Jac. 73, the law seems to have

§ 62. In order to render one man liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally produced the acts of the others.^{1*}

been well settled, and required satisfaction as a bar in trespass. In Brooke's Abr. tit. Judgment, pl. 98, it is stated that if two commit a trespass the injured party may sue them separately; and one defendant cannot plead that the plaintiff has obtained judgment against the other for the same trespass and taken him in execution. In Morton's Case, Cro. Eliz. 30, it was determined that a judgment and execution against one joint trespasser which had been satisfied, was a bar to a suit against a cotrespasser; although this was questioned by one of the judges. In the same year, and in the same court, the case of Lendall and Pinfold, 1 Leon. 19, was decided. The plaintiff brought an action of trespass, "and had judgment and execution accordingly." Afterwards he brought an action for the same trespass against a cotrespasser, and the judgment and execution were considered a good bar. This case, unless by the phrase "had execution," is meant that the plaintiff had the effect of execution, is not reconcilable with the determination in Morton's Case, nor with Hitchcock and Thurland's Case, 3 Leon. 122, decided in the same court the succeeding year. In the latter case, which was an action of trespass, the defendant pleaded that the plaintiff had obtained judgment against J. S., a cotrespasser, "and had execution of damages." The court held the plea good. Plowden said, "it was a good bar, for that all is but one trespass; and satisfaction by one of the trespassers is satisfaction for the other. And if the plaintiff had released to the other trespassers, the defendant, if he had it in his hand, might well plead it." The case of Brown v. Wooton, Cro. Jac. 73, which was an action of trover, introduced a new principle, and decided that a judgment and execution in behalf of a person concerned in the same trespass were a bar. The ground of the determination was, "that the cause of action being against diverse, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is rendered *in rem judicatam* and to certainty, which takes away the action against the others." Some decisions, since the case just mentioned, have followed it as a precedent, and particularly Wilkes v. Jackson, 2 Hen. & Munf. 355. But many cases have considered satisfaction as requisite to bar a separate suit. That a judgment alone is not a defense was adjudged in Livingston v. Bishop, 1 Johns. 290; and in Thomas v. Rumsey, 6 Johns. 26, it was thought necessary to plead judgment with satisfaction, and on this latter ground the plea was held sufficient. In Bird v. Randall, 3 Burr. 1345, Lord Mansfield, speaking of joint trespassers, remarks that the plaintiff may proceed against all or any of them, "yet he shall have but one satisfaction for the same injury."

If two actions are brought, and both go into judgment, and satisfaction is obtained in one, although there can be no extinguishment of the cause of action in the other, because it is merged in the judgment, the court, exercising its "sense of equity," will stay execution against the damages if it has not issued, remand it if it has, and has not been served, or grant relief by *audita querela*, which is in the nature of a bill in equity, if it has, but permit execution for the costs (Knickerbacker v. Colver, 8 Cowen, 111).

¹ Guille v. Swan, 19 Johns. 381; Brooks v. Ashburn, 9 Geo. 297; Whitaker v. English, 1 Bay, 15; Chanet v. Parker, 1 Rep. Con. Ct. 333; Johnson v. Thompson, 1 Bald. 571; Ously v. Hardin, 23 Ill. 403; Hamilton v. Fulton, 28 Mo. 359; Storer v. Hobbs, 52 Maine, 144; Eddy v. Howard, 23 Iowa, 175.

* In Langdon v. Bruce, 27 Vt. 657, which was an action of trespass for cutting timber, it appeared that the defendant and one Watts bought a lot adjoining the land of the plaintiff, Watts to have the timber, and the defendant the land. There was a dispute as to the true division line, of which the defendant

It was accordingly held that an action of trespass for forcibly entering a house and turning the person in possession out, could not be maintained against a military surgeon who simply made a requisition on the commandant of a post for a proper building for a hospital, and pointed out the house in question; it not being proved that the surgeon personally participated in, aided, or incited the forcible dispossession.¹ In an action of trespass against several, on account of injury done to the plaintiff by a ball thrown by one of the players at wicket, the judge laid down the following as essential in order to convict the defendants as joint trespassers: 1st. It must be shown that the parties were engaged in the common pursuit of a game at wicket on the public highway. 2d. That the game was of such a character that, from the width of the road, and the number of persons usually passing thereon, it would endanger those traveling on the public high-

knew; but he supposed and claimed that the judgment in an action of trespass in favor of the former owner of the lot purchased by him and Watts, determined the question of title in their favor, and he so told Watts, who cut the timber on a strip of land which was ultimately decided to belong to the plaintiff. The defendant had nothing to do with the cutting of the timber, except that he let one of his hired men assist Watts, and charged Watts therefor. The only question presented at the trial in the county court was in regard to the defendant's participation in the taking of the timber by Watts. The Supreme Court, in affirming the judgment, which was for the defendant, said: "We think it could scarcely be claimed that the defendant's letting his hired man to Watts to assist in cutting the timber, could be regarded as any participation in the act of Watts in cutting the timber off from any other than the lot owned by him and defendant. Nor should we regard the division of the lot in the manner stated, even with the belief that the timber in question was on the defendant and Watts' lot, as any participation of defendant in the taking of this timber, unless the defendant did something, or said something which was intended to induce Watts to cut this timber, and which had that effect, or unless he was in some way benefited by the timber being cut. But nothing of this kind is found. If it appeared affirmatively that the division was made upon the basis of this timber forming a portion of the joint property in any such manner as to leave defendant liable to make up the loss to Watts, the defendant must undoubtedly be held liable. But so far from this appearing, it would rather seem that he had no interest whatever in that question, but that Watts took the risk of where the lines of the lot were, as to the timber, and the defendant as to the land. And nothing appears in the case to show that the defendant took any part whatever in determining Watts where to cut timber, more than by expressing an opinion in regard to the effect of the former decision in settling the boundaries of the dividing line of the two lots. And having no interest in the question, so far as the timber was concerned, we do not see why it should involve him in the act of Watts in cutting the timber any more than it would had he had no interest in the land."

¹ McIntyre v. Green, 36 Geo. R. 48.

way; that the individual who threw the ball should have been acting in the usual manner of persons engaged in the game of wicket. It was held, that as these instructions required that the plaintiff should satisfy the jury that the defendants had entered upon a common pursuit of a dangerous tendency, which might result in an injury to one using the highway for the ordinary purpose of travel, they comprised all the elements necessary to constitute a joint liability and to render all engaged joint trespassers.¹ *Williams v. Sheldon*,² was an action of trespass against a number of persons for entering upon the plaintiff's land, and cutting and carrying away logs and shingles. It appeared that all the defendants were seen upon the lot engaged in cutting and carrying away timber at different times; but whether they were jointly concerned or not was a matter of inference. They used one common road, made expressly for the purpose of getting timber from the lot, and also had a common shed or temporary house to which all their logs were drawn, for the purpose of being loaded on their sleighs, and where their shingles were made, and where they occasionally slept. The circuit judge instructed the jury that to entitle the plaintiff to a verdict against all the defendants as joint trespassers, it must appear that they acted in concert in committing the trespass complained of; that if some aided and assisted the others in the trespass, all were equally guilty; or if some employed the others to commit the trespass, or assented to the trespass committed by the others, having an interest therein, they were all jointly guilty. And in commenting upon the evidence to the jury, he again observed that they must be convinced from the evidence that all the defendants were acting in concert in the trespass in question, or they could not all be found guilty; but that it would not be material if they had unequal interests in the avails of the trespass, for that those who confederated to do an unlawful act were deemed guilty of the whole, although their share in

¹ *Vosburgh v. Moak*, 1 Cush. 453.

² 10 Wend. 654.

the profit might be small. That if any of the defendants were not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone, without any concert with the others, they ought to be acquitted, and those only found guilty who were acting jointly. The Supreme Court held that the foregoing was a correct exposition of the law.* Where a contractor, acting under instructions from the owner of a lot, encroached on the wall of the adjoining proprietor, by erecting a building six inches wider than the lot, it was held that the owner was a cotrespasser with the contractor.¹ A. authorized B., a broker, to distrain for rent due to him from C. B. having entered for the purpose of executing the warrant, took away, among other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory. It was held that A. was jointly liable with B.² Where A. and B. were riding in a wagon on a turnpike road, and B. jumped out, and having shot a hare in an adjoining field, brought it to A., who remained in the wagon, the latter was held guilty of the trespass.³ †

¹ Williamson v. Fischer, 50 Mo. 198.

² Gauntlett v. King, 3 J. Scott, N. S. 59.

³ Stacey v. Whitehurst, 18 C. B. N. S. 344.

* Where several jointly hire a carriage, horses, and driver, with the understanding that the horses shall be in the exclusive charge of the driver, and one of the hirers causes an injury to the horses and carriage, each of the hirers is liable for the damage. O'Brien v. Broun, 2 Speers, 495. And if the owner of a carriage having loaned it to two persons, rides with them, the three will be liable for injury done to another carriage by reckless driving. Bishop v. Ely, 9 Johns. 294, was an action against Ely and two others for violently driving against the horse of the plaintiff on the highway, whereby the plaintiff's horse was killed. It appeared that Ely lent the other two his wagon, and that having put their own horses to it, they invited Ely to ride with them, which he was doing when the accident occurred. It did not appear that Ely disapproved of the violent manner in which the team was driven, or expressed any regret at the occurrence, either at the time of it or afterwards. Held, that the evidence was sufficient to charge all the three defendants with a joint trespass.

† "Lord Coke in 4 Inst. 317, states as a difference between the forest law and the common law, that by the former, whosoever receives within the forest any malefactor in hunting or killing the king's deer, knowing him to be such malefactor, or any flesh of the king's venison, knowing it to be the king's, is a principal trespasser. Whereas, by the common law, he that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use, or for his benefit; and then his agreement subsequent amounted to a commandment, for in that case, *omnis rati habitio retrahitur et mandato equiparatur*.

§ 63. It is not accurate to say, that all those present at the commission of a trespass are liable as principals who make no opposition or manifest no disapprobation of the wrongful invasion of another's person or property. The true rule on that point is this: Any person who is present at the commission of a trespass, encouraging or inciting the same, by words, gestures, looks, or signs, or who in any way, or by any means, countenances or approves the same, is in law deemed to be an aider and abettor, and liable as principal; and proof that a person is present at the commission of a trespass, without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting it.¹ But if he is only a spectator, innocent of any unlawful intent, and does no act to countenance or approve those who are actors, he is not to be held liable on the ground that he happened to be a looker on, and did not use active endeavors to prevent the commission of the unlawful acts.² * If A. give B. leave to go into a field in

By the law of the forest, such a receiver is a principal trespasser, though the trespass was not done to his use" (quoted by Parke, J., in *Wilson v. Barker*, 4 Barn. & Adolph. 614).

Where several are engaged in a lawful act, and one of them commits a trespass in aid of their common purpose, the others not directing or countenancing him therein, they are not liable therefor (*Richardson v. Emerson*, 3 Wis. 319).

Where the owner of land engages another to make an unlawful encroachment on the street in front of such land, the parties are jointly liable (*Clark v. Fry*, 8 Ohio, N. S. 358).

A person cannot maintain trespass against his cotrespasser (*Doolittle v. Linsley*, 2 Aik. 155; *Tubbs v. Lynch*, 4 Harring, 521). Neither can contribution be claimed as between joint wrong-doers (*Merrywether v. Nixan*, 8 Term R. 186; *Farebrother v. Ansley*, 1 Camp. 343; but see *Bell v. Walsh*, 7 Cal. 84, *contra*).

Where two persons are sued, and one of them, without the knowledge of the other, confesses judgment as well for his codefendant as for himself, and the property of the codefendant is taken and sold under an execution issued upon such judgment, and an action of trespass is brought by him therefor against the first named, the judgment is a justification without proof of authority to confess it (*Ingalls v. Sprague*, 10 Wend. 672).

¹ *McManus v. Lee*, 43 Mo. 206.

² *Hale's*, P. C. 459; *Roscoe's Cr. Ev.* 2d ed. 201; *Brown v. Perkins*, 1 Allen, 89.

* *Brown v. Perkins*, *supra*, was an action for breaking and entering the plaintiff's grocery and destroying various articles. At the trial in the Superior Court, the evidence tended to show that by a concerted action or conspiracy,

which A. has no right, and B. goes there, this will not make A. liable as a cotrespasser with B. But if A. order and authorize B. to go into the field, and he does so, A. is a joint trespasser with B.;—the latter constituting an authority, the former leave and license only.¹

§ 64. If two men having separate servants, separately send them to do one and the same thing, and they in doing it occasion an injury to any one for which their masters would be responsible, they will be jointly liable by reason of their sending their servants to act jointly. But they would not be liable, either jointly or severally, for trespasses done by their servants when not in their masters' business. Nor would they be jointly liable if the servants had been sent each to do his master's separate business.²

12. *Settlement of claim for damages.*

§ 65. The following are established propositions in relation to the settlement of a claim for damages: 1st. If A. and

many persons assembled with the design to commit unlawful acts by trespassing on the premises and destroying the property of others whom they supposed to be engaged in an unlawful and obnoxious traffic; and that in pursuance of this common design, they broke and entered the shop of the plaintiff, and there injured and destroyed various articles of personal property. It also appeared that both of the defendants were present during the perpetration of these unlawful acts on the premises of the plaintiff; and there was evidence which tended to prove that both of them, if they did not actively participate in the unlawful acts, were nevertheless there in pursuance of the common design, and were sympathizing with and giving countenance to those who were engaged in the work of destroying the plaintiff's property. Upon this point however the evidence was contradictory; the defendants contending that they were there as spectators only, innocent of any combination or conspiracy, and in no way participating in, or encouraging the unlawful acts of others. The effect of the instruction given to the jury, was to lead them to believe that the defendants could not be held liable as principals for aiding and assisting in the unlawful acts by countenancing and approving the measures which were taken, or by making no opposition, or manifesting no disapprobation of them, unless they stood in such relation as would naturally enable them to exercise some authority, control, or influence, over the actors; as where the actors are wives or children, especially daughters, and the persons present, are husbands or fathers of such actors. The Supreme Court, remarked, that "this was clearly erroneous, not only because it annexed a limitation or qualification to the rule by which aiders and abettors are held to be principals, which does not exist, but also, because it omitted to meet that part of the evidence which tended to show that both the defendants were present, giving aid and assistance to the actors in the unlawful enterprise, towards whom they stood in no such relation as was contemplated in the instructions."

¹ Robinson v. Vaughan, 8 Car. & P. 252.

² Adams v. Hall, 2 Vt. 9..

B. trespass upon C., and either satisfies the damage before a suit is commenced, the cause of action is extinguished; and if a suit be afterward brought against either, that satisfaction may be pleaded in bar; for no right of action exists at the time the action is commenced. If a release be given, it may be pleaded as a release by him to whom it is given, and as a satisfaction by the other.¹ 2d. If an action be brought against one before satisfaction, and he accord and satisfy the damage, that extinguishes the cause of action also, and if a suit be afterward brought against the other, the satisfaction may be pleaded in bar.² 3d. If an action be brought against all, and one pay damages and costs, and the action be dropped, no action can afterward be brought against the others.³ 4th. If an action be brought against all, and pending the action one accord for himself only, and pay the damages and costs, it is a discharge of the action as to all.⁴ In *Gilpatrick v. Hunter*,⁵ the plaintiff commenced an action of trespass against the defendants and one Leonard for a joint trespass committed by them upon his person and property. He afterward received of Leonard five dollars "in full of said Leonard's trespass where he and Wilson P. Hunter were in company, together with others;" and it was held that this operated to discharge the other joint trespassers. The court remarked that the difficulty in maintaining the suit against the others was, that the law considered that the one who had paid for the injury occasioned by him and had been discharged, committed the whole trespass, and occasioned the whole injury, and that he had therefore satisfied the plaintiff for the whole. In *Ayer v. Ashmead*,⁶ which was an action of trespass *quare clausum fregit*, the defense was, that one Grumley, together with the defendant, committed the trespass, and that Grumley paid to the plaintiff the damages and costs in full, which were accepted by the plaintiff as a satisfaction for the tres-

¹ *Brown v. Marsh*, 7 Vt. 327.

² *Cocke v. Jeunor*, Hobart, 66.

³ 2 Greenlf. Ev. § 30, note; 1 Saund. Pl. & Ev. 29.

⁴ *Ellis v. Bitzer*, 2 Ham. 89; *Frye v. Hinkley*, 18 Maine, 320.

⁵ 24 Maine, 18.

⁶ 31 Conn. 447.

pass. The plaintiff resisted this position on the ground that he instituted two actions of trespass, one against the present defendant and one against Grumley, and he only intended to settle the Grumley suit. A receipt "in full for damages and costs in a case of trespass by said Grumley on my land," executed by the plaintiff to Grumley after both suits had been commenced but before the return day for either, was produced. The settlement with Grumley was not intended to include the present action, nor was the sum paid understood to be paid on account of the damages claimed of the defendant, or of the costs of the suit, or any part thereof; and the writing was not given or received for the purpose of discharging, or in any way affecting, the present action, or the plaintiff's right of recovery therein, but for the sole purpose of discharging Grumley alone. In the court below, the plaintiff objected to the admission of the receipt in evidence, because it did not purport to release the defendant or relate to the present action. It was, however, admitted. The judge charged the jury that although they should find a joint trespass, and the payment by Grumley and the receipt given therefor, and the acceptance thereof in satisfaction of the damages claimed of Grumley, and the costs of the suit against him, and that the receipt was given upon the settlement of that suit for the purpose of discharging Grumley from said damages and costs claimed in the suit against him; yet, if the present action was then pending, and costs had accrued therein and were unpaid, and the present action was not included nor intended to be included in such settlement, and nothing had been paid or received on account of such costs, then their verdict should be for the plaintiff for nominal damages and his costs. A verdict having been found for the plaintiff, in accordance with the foregoing instruction, the Supreme Court granted a new trial for error in the charge.*

* In *Ayer v. Ashmead*, *supra*, Hinman, C. J., in delivering the opinion, remarked that, "if it were said that it was inequitable to allow a satisfaction to cover the costs in both suits when such was not the intention, the answer was, that the plaintiff was not obliged to accept of satisfaction unless he secured his costs." Butler, J., delivered a very elaborate dissenting opinion, in the course

§ 66. A settlement with some of several joint defendants will be deemed, in the absence of proof to the contrary, a

of which, he said: "I concede fully, that such accord by a defendant in one action satisfies and extinguishes the cause of action in both. Here one has been discontinued pursuant to the accord; the other is pending, and what shall the court do with it? It was justifiably commenced for a good cause of action, and so pursued up to the time of the satisfaction of the trespass, and the extinguishment of that cause. The plaintiff has incurred cost in the lawful, and *presumptively* in the *necessary* pursuit of his legal rights to obtain satisfaction for an injury; for as to the necessity of instituting and prosecuting this action, he was and must be held to have been the judge. Into that question we cannot go. Having then lawfully and necessarily incurred those costs, is he to lose them? Nay, more, is he to be punished for such necessary exercise of his lawful rights by an appeal to a higher court, the pleading of the general issue, to make the trial more expensive, with a certain judgment against him, either on that issue, or on a plea of satisfaction, and a consequent certain heavy bill of costs? Can a court permit that, without divesting itself of that 'sense of equity,' which must necessarily be its guide in the administration of the law—that 'soul and spirit,' by which, says Blackstone, 'positive law is construed, and rational law is made?' * * * In this case, it was the duty of the defendant to pay and tender the costs in this action up to the time when the cause of action was extinguished, and then, if the plaintiff did not withdraw the action, to plead the satisfaction, and aver the tender. But until those costs were paid, it was in the power of the court to refuse or overrule his plea of satisfaction, and render judgment for nominal damages and costs. * * * It has been urged that the plaintiff voluntarily accepted satisfaction for the trespass, and that he might then have insisted on the costs of this action. But that cannot help the defendant. The plaintiff had a perfect right to pursue both actions, and to settle either. He could not enforce the collection of the costs of this suit in his action against Grumley, and therefore he waived no right, and lost none. It was optional with him, to take his damage before judgment, or after it had been ascertained on a default and hearing in damages, or by verdict; and voluntarily, or by force of an execution. It was entirely immaterial, when or how he got it. All that the defendant had any interest in, was the consequent satisfaction for the trespass; and all the interest the plaintiff afterward had in this suit, however that satisfaction was obtained, was his costs; and that interest he had a perfect right to retain and enforce against the defendant by insisting that he pay the costs before he pleaded the satisfaction, or suffer a verdict for nominal damages."

It has been claimed that there is a substantial analogy between a joint trespass, and a joint and several promise, in respect to the rights and liabilities of the parties to the injury by the trespass, or the promise in the contract. The analogy is not perfect. A wrong committed by several, is, *per se*, several in its character, and only joint because each is by law made liable for the acts of each and all done in furtherance of the common design. The tort, therefore, although several in its nature, is "amalgamated." But a promise is joint and several in itself and in terms, each promising for himself, and jointly with the others. Hence a promisee in a contract, may sue one or all; but a party trespassed upon, may sue one, all, or any number. So, a joint and several debt may be paid, or the contract fulfilled by one or for all, with right of reimbursement, or contribution, as the case may be. But a trespass can only be satisfied, or the cause of action directly released and extinguished without right of contribution. And in case of several judgments in trespass, the plaintiff may elect *de melioribus damnis*; for the damages may be greater in one than the other. But no such election in the nature of things can be had in case of several judgments for the same debt or other certain liability. Still, it is true that in either case, the right to bring separate actions against each, and to pursue them all to final judgment and execution, or until a satisfaction is obtained for the debt or injury from

settlement with all. Accordingly, where in an action for an assault and battery committed by the defendants and James Bowen and Merrill Bowen jointly upon the plaintiff, it appeared that after the trespass was committed, and before the action was brought, the plaintiff constituted one White, his agent, with full power to manage and control any right of action the plaintiff might have growing out of the assault, and told White he might have all he could make out of it; and that afterward White settled with the Bowens for the plaintiff's claim upon them for damages resulting from said trespass, receiving from each the sum of \$100, and giving each a writing signed by him to indemnify and save them harmless from all their liability to the plaintiff for damages that the plaintiff sustained by reason of the said trespass,—it was held that in the absence of proof that the foregoing was not a settlement in full of all damages, it would operate as a discharge of all the parties engaged in the assault.¹

§ 67. Where, however, there is not a settlement of the cause of action, but merely an agreement that upon the payment by one of the defendants of a specified sum the plaintiff will not prosecute him any further, it will only reduce the damages *pro tanto*, and not be a defense to a recovery against the other defendants.² In *Snow v. Chandler*,³ which was an action for assault and battery, the defense was that the trespass was committed by the defendant and one Holt, and that the plaintiff had settled with Holt for the sum of twenty dollars. It appeared that the arrangement between the plaintiff and Holt was, that there should be a

some one of them, is the same in one case as the other. And the debt in one case, or the damage in the other, are so far "a unit and indivisible," that every judgment must be rendered for the whole. Nevertheless, the right of action against each is perfect in itself. A release of one copromisor or cotrespasser, or a discharge of one action when two are pending, is not *per se* a release or discharge of the right of action against the other, who is not a party to the release or discharge, and cannot be pleaded as such; but it inures to the other by reason of his actual privity in the promise, or legal privity in the injury, as a satisfaction, and so an extinguishment of the right to the debt or damages from that time.

¹ *Eastman v. Grant*, 34 Vt. 387.

² *Chamberlin v. Murphy*, 41 Vt. 110.

³ 10 N. Hamp. 92.

settlement so far as that the latter should pay the twenty dollars, and in case the plaintiff should choose at any future time to prosecute Holt, he should be at liberty to do so on refunding the sum so paid, the plaintiff at the same time declaring that he would not settle with the other defendant for five hundred dollars. It was held that the plaintiff was entitled to recover.*

§ 68. Although the principle is well settled that a release

* In *Chamberlin v. Murphy*, *supra*, the court said: "The defendants and their cotrespassers had incurred a liability in its nature joint and several. The plaintiffs had in fact but one cause of action, but they were at liberty to pursue it against as few, or as many of the cotrespassers as they should choose. They might sue them separately or together, but very obviously they were not entitled to more than one full satisfaction. The first piece of evidence which was excluded against objection was the receipt for \$65, given by the plaintiff's attorney to the estate of Simonds, one of the cotrespassers. This receipt, by its terms, shows that the plaintiff's damages have been satisfied to the extent of \$65, and the defendants had the right to insist upon its application to reduce the plaintiff's recovery *pro tanto*. To hold otherwise would be to permit the plaintiffs to recover for this portion of the damages twice. If they had received this sum in full satisfaction for their injury, it would have reduced the plaintiff's recovery to a nominal sum; but they, having received it as they did, not in settlement of the cause of action, but merely agreeing to prosecute this trespasser no further, it will only reduce the recovery *pro tanto*. It was not pleaded in bar of the action; and, if it had been, would, under all the authorities, have been no defense to a recovery" (citing *Spencer v. Williams*, 2 Vt. 211; *Eastman v. Grant*, 34 Vt. 389).

In *Snow v. Chandler*, *supra*, the court said: "There can be no reason why damages for a wrong done should be more easily settled and canceled than a claim for a debt due, or that the law should favor the discharge of trespassers more than the release of debtors. The principle as to what constitutes the release of a contract where there are joint debtors applies to a covenant not to sue one of two joint trespassers, for the reason that it cannot be inferred from such a covenant that it was the intention to discharge the claim of damage. The substance of the arrangement betwixt the plaintiff and Holt seems to have been this: That the plaintiff was willing to receive a small portion of the damage from Holt, either for the reason that he conceived him to be less to blame than the defendant, or that he was less able to pay his proportion of the damage; and on condition of receiving this sum the plaintiff engaged to pursue the defendant for the remainder of his claim. It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a partial satisfaction of the damage, and the plaintiff may sue or omit to sue whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage until satisfaction is made. If the individual receiving the injury sees fit to visit the penalty upon any one guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. At the same time, any partial payment by a cotrespasser avails so far for his benefit. To this extent the defendant can avail himself of the plaintiff's arrangement with his cotrespasser, but there was nothing in that contract which constitutes a bar to this suit."

of one of two or more joint trespassers is a release of all, yet to have that effect it must be a technical release, that is, by an instrument under seal. The reason why a release of one discharges all is, that it legally imports full payment, and, being under seal, its consideration cannot be inquired into, so that it is conclusive, even though it was given without consideration in fact. The rule is the same whether the claim is based upon a tort or a contract.¹*

§ 69. If an action be brought against one of several, and judgment had, or execution taken out and levied on the body, and that is discharged by taking the poor debtor's oath, it will not be a satisfaction of the trespass or affect the right to bring and pursue to judgment an action against the other.² But where separate actions are brought against joint trespassers, a recovery had in both actions, and an exe-

¹ *Brown v. Marsh*, 7 Vt. 320; *Eastman v. Grant*, 34 Ib. 387; *Brown v. Cambridge*, 3 Allen, 474; *Stone v. Dickinson*, 5 Ib. 29; *Bloss v. Plymale*, 3 W. Va. 393, *contra*.

² *Livingston v. Bishop*, 1 Johns. 290; *Sheldon v. Kibbe*, 3 Conn. 214, overruling *Brown v. Wooton*, Cro. Jac. 73, and *Yelv.* 67.

* "If divers commit a trespass, though this be joint and several at the election of him to whom the wrong is done, yet if he releases to one of them all are discharged, because his own deed shall be taken most strongly against himself. Also such release is a satisfaction in law, which is equal to a satisfaction in fact. But he who would take advantage of such a release must have the same to produce" (5 Bac. Abr. 702).

"If two men doe a trespassed to another, who releases to them all actions personalls, and notwithstanding such an action of trespassed against the other, the defendant may wel show that the trespassed was done by him and by another, his fellow, and that the plaintife, by his deed (which he sheweth forth), released to his fellow, all actions personalls, and demanded the judgment, &c., and yet sode deed belongeth to his fellow and not to him. But because hee may have advantage by the deed, if hee will show the deed to the court, hee may wel plead this" (Coke, Lit. 232).

Questions in relation to the effect of the discharge of one upon the liability of the others, have generally arisen when the discharge has been given upon the payment of part of a demand, or some consideration less than a full payment of the claim against the one discharged. Such was the case of *Spencer v. Williams*, 2 Vt. 209, and *Dean v. Newhall*, 8 Term, 168. The first case was decided on the ground that, as the discharge was not under seal, it did not operate as a release, and that upon its face it was not a full discharge, but only an agreement not to sue. In the other case, although the instrument was under seal, it was held not to be a release, but only a covenant not to sue, which all the authorities agree does not discharge the other joint debtors.

The release of one of several joint trespassers who is not in fact liable, does not take away the right of action against those who are liable (*Turner v. Hitchcock*, 20 Iowa, 310).

cution issued upon one of the judgments, and the defendant in the execution committed to jail and afterward discharged therefrom by direction of the plaintiff, the remedy upon both judgments is gone.¹ *

13. *When party confined to remedy given by statute.*

§ 70. When a statute confers some new right, and prescribes a remedy for a violation of that right, then the remedy thus prescribed, and no other, is to be pursued. But where a remedy existed at common law, and a statute creates a new remedy in the affirmative, without a negative express or necessarily implied, a party may still seek his remedy at common law.² *Coffin v. Field*³ was an action of trespass for taking certain animals in which the defendant, as field driver of the town, sought to justify the taking on the ground that the animals were going at large contrary to law. A chief ground of exception to the ruling of the court below was, that the only remedy for a party whose beasts had been unlawfully distrained and impounded by a field driver was by an action of replevin. The objection proceeded upon the idea, that as the remedy by replevin was given in such cases

¹ *Kasson v. The People*, 44 Barb. 347.

² Bac. Abr. Statute, K; 1 Chitty's Pl. 6th Am. ed. 127, 128, 164; *Colden v. Eldred*, 15 Johns. 220; *Wiley v. Yale*, 1 Metc. 553; *Elder v. Bemis*, 2 Ib. 599.

³ 7 Cush. 355.

* In *Kasson v. The People*, *supra*, the court said: "If the judgment had been in one action against the defendants in both actions for the same trespass, and one only had been charged in execution, and afterward discharged therefrom, by order of the plaintiff therein, or his assignee, the effect would have been the same. The judgment would in that case have been discharged, and no remedy could afterward have been had upon it. That here were two actions and a recovery in each for the same trespass, does not vary the principle. The discharge by the plaintiff of the defendant from imprisonment on an execution issued against him, discharges the judgment against the defendant in the other judgment. The plaintiff in the judgments was entitled to but one satisfaction for the injury he had sustained by the trespass committed by the defendants in the two judgments, and that he has had by the imprisonment of Gilbert and discharging him therefrom. It is quite true that originally he had the right to imprison the relator as well as Gilbert, to satisfy his damages, but having chosen to charge the former in execution, and to discharge him from imprisonment, his remedy on both judgments was gone. It was equivalent, in the eye of the law, to payment by Gilbert of the judgment against him" (citing *Chapman v. Hatt*, 11 Wend. 41; *Clark v. Clement*, 6 Term R. 525; *Livingston v. Bishop*, 1 Johns. 289; *Bingham on Judg. & Ex.* 206).

by statute, it operated to exclude the remedy at common law. But it was held that this was not true.*

14. *Declaration.*

§ 71. The principal act complained of should be clearly alleged in the declaration, separately from mere matters of aggravation.¹ If the description be too general, a special finding will not remedy the defect.² "It seems indeed a universal rule," says Mr. Starkie,³ "that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which in point of description, limitation, and extent, he has prescribed for himself. He selects his own terms in order to express the nature and extent of his charge or claim. He cannot, therefore, justly complain that he is limited by them." Where there is no positive averment of a trespass, but the trespass is laid by way of recital only, under a *quod cum*, it will be held bad on demurrer.⁴ †

¹ Clark v. Langworthy, 12 Wis. 441.

² Frean v. Cruikshanks, 3 M'Cord, 84.

³ Tr. on Ev. 1531.

⁴ Holbrook v. Pratt, 1 Mass. 96; Coffin v. Coffin, 2 Ib. 358; Sturdevant v. Gains, 5 Ala. 435.

* In Elder v. Bemis, *supra*, the charge against the defendant was, that he had, within the limits of the highway and without the approbation of the selectmen of the town first being had in writing, caused two water-courses, occasioned by the wash of the highway, to be so conveyed by the side of the highway as to incommode the plaintiff in the use of his barn, and thereby obstructing him also in the prosecution of his business. It was held that the plaintiff's only remedy was that given by the statute. By section five, he might complain to the selectmen, who were authorized to authorize the water-courses; and by section six, he was entitled to compensation for any damages he had sustained in his property, to be determined by the selectmen; and if he should be aggrieved by such determination of the selectmen, he might have his damages ascertained by a jury. That but for this statute, the defendant would have had a right, by virtue of his office of surveyor, to make any repairs and alterations in the highway which the public convenience required, without the approbation of the selectmen; and if the plaintiff were incommoded or obstructed in his business thereby, the defendant would not be responsible for damages. And that for the violation of the prohibition in the statute, the plaintiff was only entitled to the statute remedy (citing Callender v. Marsh, 1 Pick. 418).

† One trespass well alleged is sufficient on demurrer (Chamberlain v. Greenfield, 2 W. Blk. 810; 3 Wils. 292).

Even where distinct causes of action are embraced in the same count, provided they be such that the same species of remedy is appropriate to them all, although it may constitute duplicity in pleading, and in that respect be objectionable, yet, if the defendant does not take advantage of the objection by special demurrer, he waives the objection, and must be prepared to meet all the charges; and if the plaintiff substantiates any of them, he will be entitled to re-

§ 72. It is a sufficient description of the place of the alleged trespass to name and prove the county.¹ If the trespass be laid in a town which previous to bringing the action is subdivided, it may be alleged to have been done in the original township without regard to its subsequent division.²

§ 73. The declaration need not state the actual day of the injury, if it be proved to have been committed before the commencement of the action.³ Where the acts are alleged to have been committed after the suing out of the writ, the declaration may be amended by fixing them prior thereto.⁴ Formerly, every declaration in trespass seems to have been confined to a single wrongful act. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass.

cover. In order to apply these rules, and to distinguish between what constitutes the gist of the action of trespass, and what is mere matter of aggravation, it is only necessary to ascertain what allegations in the declaration describe a substantive ground of recovery in that kind of action. For although the declaration may contain averments descriptive of a cause of action of another kind, which may properly be introduced and proved to enhance the damages, as showing the aggravated character of the transaction, yet they will not be deemed to be any part of the gist of the suit, and do not form a distinct substantive ground of damage (*Holly v. Brown*, 14 Conn. 255).

Comyn in his Digest, Action G., states the law to be, that an action on a statute cannot be joined with an action at common law. He cites *Jenkins*, 115, as his authority; and Comyn is himself an authority, and among the highest, especially on a question of pleading. The rule in Comyn may not be of universal application. But where the forfeiture is given for a malicious and criminal act, there appear to be very strong reasons in the nature of the case for holding that the action on the statute cannot be joined with a claim of compensation for a mere civil injury. The cases would seem to show that the struggle of the courts has been hard, and by no means entirely successful, to fix on some general and uniform rule for the decision of these questions (*Morrison v. Bedell*, 2 Fost. 234).

In Maine, the design of ch. 115, § 13, of the Rev. Sts., in providing that "in all actions of trespass and trespass on the case, the declaration shall be deemed equally good and valid, to all intents and purposes, whether the same shall be in form a declaration in trespass, or trespass on the case," was to abolish the distinction between two classes of cases in the form only of declaring in the writ; so that proof which should make out a case of one class, should not fail of effect on account of the writ being appropriate for the other class. But in cases where the distinction is really of substance, the provision is inapplicable (*Tenney, J., in Sawyer v. Goodwin*, 34 Maine, 419).

¹ *Jean v. Sandiford*, 39 Ala. 317; *Shipler v. Isenhower*, 27 Ind. 36.

² *Renaudet v. Crocken*, 1 Caines, 167.

³ *Caldwell v. Julien*, 2 Rep. Con. Ct. 294; but see *Hubbert v. Collier*, 6 Ala. 269.

⁴ *Hammatt v. Russ*, 16 Maine, 171.

In more modern times, in order to save the trouble and expense of a distinct writ, or count, for every different act, the plaintiff is permitted to declare for a trespass on divers days and times between one day and another; and in that case, he may give evidence of any number of trespasses within the time specified. Such a declaration is considered as if it contained a distinct count for every different trespass. This is for the benefit of the plaintiff. But he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass. When it is considered in that light, the time becomes immaterial, and he may prove a trespass at any time before the commencement of the action, and within the time prescribed by the statute of limitations.¹*

§ 74. Where special or peculiar damages are claimed, such as are not the usual or natural consequences of the act done, it is proper to set them forth specifically in the declaration, by way of aggravation, that the defendant may have due notice of the claim.²† A general allegation will not

¹ *Pierce v. Pickens*, 16 Mass. 470; *post*, §§ 96, 958.

² *Dickinson v. Boyle*, 17 Pick. 78.

* It would be giving an undue advantage to the plaintiff if he could avail himself of the declaration in both of the modes mentioned in the text, and would frequently operate as a surprise on the defendant. He is, therefore, bound to make his election before he begins to introduce the evidence. In *Sedley v. Sutherland*, 3 Esp. 202, Lord Kenyon said that where an action is brought for a joint trespass, and the plaintiff elects to go for a trespass at any particular time, he must confine himself to that period; and if all the defendants were not concerned in the trespass committed at that time, the plaintiff cannot have recourse to a trespass committed at a future time, when some of the defendants were concerned who were not implicated in the first transaction; and he says the reason is this, that some of the defendants might be thereby subjected to damages for a trespass in which they had no part or concern.

It is too late to object to the declaration after a plea of not guilty (*James v. Tait*, 8 Port. 476). But the party may, in error, insist upon the insufficiency of the verdict and judgment (*Sturdevant v. Murrell*, 8 Port. 317). The doctrine that where opportunity is given for objections, and none are made, but the party whose business it is to object remains silent, all reasonable intendments will be made by a court of error to uphold the judgment, has been frequently announced by the courts of New York (see *Baldwin v. Calkins*, 10 Wend. 167; *Menderback v. Hopkins*, 8 Johns. 436; *Ford v. Monroe*, 20 Wend. 210; *Oakley v. Van Horn*, 21 Wend. 305; *Holbrook v. Wight*, 24 Wend. 169).

† Notice to the party is an indispensable requisite, founded upon principles of natural justice (4 Blk. Com. 280; *Chase v. Hathaway*, 14 Mass. 222; *Colt v. Eves*, 12 Conn. 243).

enable the plaintiff to prove special damages; that is, damages which the law does not imply from the facts alleged.¹ Accordingly, in an action by the husband for obstructing a right of way leading to the wife's land "to the damage of the plaintiff in the sum of three hundred dollars," it was held that loss or diminution of rent was not an element of damages which the jury could legally take into consideration.² And where the plaintiff alleged the loss of divers lodgers, without naming them, it was held that he could not be permitted to prove the loss of a particular lodger.³

§ 75. At common law, in actions in form *ex delicto*, if a party who ought to be joined as plaintiff be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of nonsuit, under the plea of the general issue, or demur, or move in arrest of judgment, or support a writ of error, although the objection appear upon the face of the declaration or other pleading of the plaintiff.⁴

§ 76. When all of the parties plaintiff do not have an interest in the cause of action, it is, in one sense, a misjoinder of plaintiffs; but, in a more important sense, it is a failure to make a case entitling the plaintiffs to recover.⁵ Hence, in such cases in New York, before the Code, parties thus caught would have been nonsuited. Now, under the provisions of the Code, judgment may be given for one plaintiff and against the other, if the objection is taken upon the trial by motion for a nonsuit or otherwise. If the objection appears upon the face of the complaint, and is taken by demurrer, and

¹ Adams v. Barry, 10 Gray, 361; Baldwin v. Western R. R. 4 Ib. 333; Rising v. Granger, 1 Mass. 47; Warner v. Bacon, 8 Gray, 397.

² Adams v. Barry, *supra*.

³ Westwood v. Cowne, 1 Stark. 172.

⁴ 1 Chit. Pl. 76; Abbe v. Clark, 31 Barb. 238; Jones v. Lowell, 35 Maine, 538; Cabell v. Vaughan, 1 Saund. 291; True v. Congdon, 44 N. H. 48; Child v. Sands, Salk. 31; Brown v. Hedges, Salk. 290; Addison v. Overend, 6 T. R. 766; Wilbraham v. Snow, 2 Saund. 47; Thompson v. Hoskins, 11 Mass. 419; Bradish v. Schenk, 8 Johns. 151; Wilson v. Gamble, 9 N. Hamp. 74.

⁵ See *post*, § 952.

amendment may be allowed upon terms;¹ when husband and wife unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.²*

¹ Mann v. Marsh, 35 Barb. 68; N. Y. Code, §§ 274, 173; but see Abbe v. Clark, 31 Barb. 238.

² Mann v. Marsh, *supra*.

* Where there is no statutory provision to the contrary, actions by the State, or for the benefit of the State, are to be brought in the name of the State in cases where, upon common law principles, the legal interest in the subject-matter is in the State. State v. Bradish (34 Vt. 419), was an action of trespass *quare clausum fregit*, and for carrying away certain articles of personal property alleged to belong to the State of Vermont. The property in question, consisting mainly of tools for cutting stone for rebuilding the State House, was, when taken by the defendant, in a temporary blacksmith shop on the *locus in quo*, and in the use of men in the employment of the State. The defendant took the property as deputy sheriff, by virtue of a writ of attachment against one Heustis. It appeared that Heustis had originally taken the contract for building the State House, and that he had provided himself with the necessary tools and implements, but that he had afterward given up his contract and tools to the State. It was insisted by the defendant's counsel that the action could not be maintained in the name of the State. The Supreme Court, in affirming the judgment of the County Court, which was for the plaintiff, said: "The existence of the State and its capacity to maintain suits being of a public character, the court will take judicial notice whether, by law, it can maintain this suit in the name of the State. It is provided in the Constitution, as well as by statute, that criminal prosecutions shall be in the name of the State; but the Constitution is silent as to the mode of prosecuting civil suits in behalf of the State, or suits in which the State is the real plaintiff or interested. Hence, in the absence of legal regulations to the contrary, the common principle applicable to other parties must apply; that is, the suit must be in the name of the person or party, whether natural, or corporate and artificial, having the legal interest. There is no statute prohibiting the State from bringing suits in its own name, and no statute providing that all actions by the State shall be commenced and prosecuted in any other name. There are numerous provisions in the statutes for bringing certain suits in the name of particular officers of the State, such as the State treasurer, and some other officers. In relation to actions coming within such provisions, probably the statute must be followed; but beyond this, no prohibition against prosecuting suits in the name of the State of Vermont can be implied. On the contrary, it is evident, from the statutes on this subject, that there are civil suits which may be brought, as this is, in the name of the State. Chap. 9, § 50, Comp. Stat. p. 84, expressly provides that, in case of default of a State's attorney, the auditor of accounts shall cause a suit to be brought against him, '*in the name of the State of Vermont.*' In chapter 42, Comp. St. § 6, p. 298, entitled 'Forfeiture of Grants,' which includes grants of land by the State, it is provided that the proceedings shall be by writ of *scire facias*, '*in the name of the State.*' In chap. 61, § 21, p. 380, entitled, 'The limitation of real and personal actions and rights of entry,' it is provided that the limitations therein prescribed shall apply to the same actions when brought in the name of the State, or in the name of any officer, or otherwise, for the benefit of the State, in the same manner as to actions brought by citizens. There must be numerous instances where the State would have occasion to bring suits where no provision is made for bringing them in the name of any officer of the State; and unless, in such cases, the State can maintain actions in its own name, the legislation on this subject is very defective."

15. *Plea.*

§ 77. Every plea in bar must either contain a denial of the plaintiff's allegations, or must confess and avoid the facts stated in the declaration. The former constitutes the general issue; while matter in confession and avoidance is pleaded specially. When the matter thus specially pleaded amounts to a mere denial of the allegations, which the plaintiff, under a plea of not guilty, must necessarily prove to maintain his action, it is bad.¹*

§ 78. Defenses apparently inconsistent, are allowed to be interposed by separate pleas. Not guilty, and a justification, and accord and satisfaction, may be pleaded together; or not guilty, and *son assault demesne*; or a license, and justification; or not guilty, and *liberum tenementum*; and so of several other defenses.²

§ 79. There may be one plea to one part of the declaration, and a different plea to another part; but the pleas must show with certainty what part of the declaration each plea is intended to answer.³ If the declaration contain two counts for the same offense, to both of which the defendant pleads the general issue, and to one a special plea in bar, and the evidence supports the latter, he will be entitled to a verdict on both issues.⁴

¹ 1 Chit. Pl. 9th Am. ed. p. 527; *Dorman v. Long*, 2 Barb. 214.

² *Walrath v. Barton*, 11 Barb. 382.

³ *Orange v. Berry*, 4 Fost. 105; *Osborne v. Rogers*, 1 Saund. 264; *Cottingham v. The State*, 7 Black, 405.

⁴ *Curl v. Lowell*, 19 Pick. 25.

* When a plea confesses and avoids the material facts in the declaration, there must not also be a traverse, because it shall not be in the power of the party, by adding a traverse, to prevent the other party from denying the facts which avoid his title (*Cystead v. Shed*, 13 Mass. 520; s. c. 12 Mass. 505). In Vermont, the statute (Genl. Sts. p. 200, § 44) allowing a tender to be pleaded in actions for torts, the tender was not intended to be made the subject of a plea in bar, to be tried by a jury, but only a matter to be acted on by the court in the taxation of costs, in the discretion of the court, under the limitations therein prescribed. The jury are to try the case without reference to the tender; and in taxing costs, if it appears to the court that the defendant tendered a sum equal to, or greater than, the amount of damages found by the jury, and costs up to the time of the tender, the plaintiff recovers no costs accruing after the tender; and, in that event, the court, in their discretion, may allow the defendant to recover costs accruing after the tender (*Adams v. Morgan*, 39 Vt. 302, citing *Smith v. Wilbur*, 35 Vt. 133). In an action of trespass, the defendant, by pleading the general issue, waives all dilatory defenses (*Hill v. Morey*, 26 Vt. 178).

§ 80. As a bare intent not acted upon, mutable in its nature, and which may never be carried into effect, cannot render a lawful act unlawful, such an intent is not issuable. But where the party, at the time of the alleged offense, was acting in pursuance of his illegal purpose, the intent is material, and may be traversed. *French v. Marstin*¹ was an action for assault and battery, to which the defendant pleaded that the plaintiff broke and entered the defendant's close, and refusing to depart when requested, the defendant gently laid his hands upon him and removed him. The plaintiff replied, the grant of a right of way from the highway to a quarter-acre lot described, and that he was going across the defendant's land in this way, and not out of it, to go to that quarter acre. The defendant, in his rejoinder, admitted the right of way claimed to the quarter acre, and that the plaintiff was passing across his land in his way, and to the quarter acre; but he alleged that the plaintiff, at the time, &c., was passing into, over, and across the said close of the defendant, and through said one-fourth of an acre, to other lands of the plaintiff, lying farther than and beyond the said one-fourth of an acre, known, &c. The objection of the plaintiff was, that this was but an imperfect mode of stating that the plaintiff *was intending* to go to lands beyond the quarter acre, and that such intention was not issuable. It was held that, although the passing of the plaintiff through the quarter-acre lot was not necessarily a wrong, yet it was *prima facie* such, and the plaintiff must set out the facts which deprived it of its wrongful character, or deny the passing with the wrongful object charged, and that his intent would then be a question for the jury.

§ 81. Where the action is against several, the defendants may plead separately or jointly;² but on a joint plea in trespass, no separate justification can be set up. The plea being entire, cannot be good in part and bad in part, an entire plea not being divisible. Each defendant waives any

¹ 4 Fost. 440.

² *Lansing v. Montgomery*, 2 Johns. 382.

privilege or defense peculiar to himself, and must share the fate of his associates as to any matter of justification. Consequently, if the matter jointly pleaded be insufficient as to one of the parties, it is so as to all.¹ An officer even forfeits his right to double costs under the statute by uniting in a plea with a defendant who has not the same right.² Declaration in trespass against three. Plea by all, not guilty. Separate pleas of justification by two. Replication to these pleas that those two defendants were guilty of excess. Rejoinder by all three defendants that they were not all three guilty of excess. On demurrer, the rejoinders were held ill, and judgment was rendered for the plaintiff.³*

§ 82. It is an established rule of the common law, that if a defendant has cause of justification or excuse, he must plead it, and cannot give it in evidence under the general issue. The reason of the rule applies to actions for trespass, it being necessary to prevent surprise, and to enable parties to go to trial on equal terms.⁴† In *Briggs v. Mason*,⁵ the

¹ *Schermerhorn v. Tripp*, 2 Caines, 108; *Earl of Manchester v. Vale*, 1 Saund. 28, note 2; *Bradley v. Powers*, 7 Cowen, 330; *Moors v. Parker*, 3 Mass. 310; *Gleanon v. Edmunds*, 2 Scam. 448.

² *Merrill v. Near*, 5 Wend. 237; *Wales v. Hart*, 2 Cowen, 426.

³ *Morrow v. Belcher*, 7 D. & R. 187; 4 B. & C. 704; *Anon. Lofft*. 364.

⁴ *Hall v. Fearnley*, 3 Gale & D. 10; 7 Jur. 61; 12 L. J. N. S. 22; *Walker v. Hitchcock*, 19 Vt. 634; *Austin v. Norris*, 11 Ib. 38; *Pearcy v. Walter*, 6 Car. & P. 232; *Fuller v. Rounceville*, 9 Fost. 554.

⁵ 31 Vt. 433.

* "The principle has been established that if two or more defendants join in a justification of a trespass, by a special plea which would have been a justification to some of them had they pleaded it separately, but which would not justify others of them, the plea is bad as to all. The reason is, that the court cannot sever the justification, and say that one is guilty and the other is not, when they all put themselves on the same terms. This rule is a very artificial one, and ought never to be extended beyond the very cases to which it has been applied; and it may safely be asserted that it never has been extended to the general issue of not guilty pleaded jointly" (*Spencer*, Ch. J., delivering opinion in *Higby v. Williams*, 16 Johns. 215).

After issue joined, the defendant may move to withdraw the general issue, pay money into court, and plead *de novo* (*Devaynes v. Boys*, 2 Marsh. 356; 7 Taunt. 33; *Nestor v. Newcome*, 4 D. & R. 776; 3 B. & C. 159). Where the general issue is on record, and the defendant means to suffer judgment by default on a new assignment, so much of the general issue as applies to the trespasses newly assigned should be withdrawn (*Cross v. Johnson*, 4 M. & R. 290).

† Mr. Starkie (*Tr. on Ev.* vol. 3, p. 1462) says: "The defendant cannot under the general issue, except by virtue of the positive enactment of a statute,

defendant sought to establish the following exception: That when the plaintiff, in proving the trespass, also proves those facts which justify the trespass, so that in reality no *prima facie* trespass is established by the plaintiff, which is not at the same time disproved, then the matter in justification may be relied upon under the general issue. It was urged that the object in requiring a special plea being to apprise the plaintiff of the facts to be relied upon in defense, where the plaintiff himself proved those facts, the reason of the rule ceased. But the court did not adopt this view.*

give in evidence any matter in excuse, justification, or satisfaction of the alleged trespass, or any interest short of property and right of possession—such as a right of common, or a public or private right of way, or a right to an easement." The same rule is found in 1 Chitty's Pl. 492, and several authorities are cited to support it, that wherever the act would be *prima facie* a trespass at common law, any matter of justification or excuse must be pleaded. And see *Babcock v. Lamb*, 1 Cowen, 238, where this very point was decided.

At common law, the pleadings and evidence formed correlative branches of the law, and were in symmetry. A party was bound to prove what he alleged, if traversed, and he was neither bound nor permitted to prove more; not bound to prove more, as he had not so undertaken, and would be therefore unprepared, and not permitted, as it would be a surprise on the opposite party. This extended early to all personal actions then in use—trespass, detinue, replevin, account, covenant, and debt. Afterward, in the actions of trover, assumpsit, and trespass on the case, this rule was much relaxed, and the relaxation gradually extended to debt, and perhaps to some other actions *ex contractu*. The expense which this occasioned, in preparing at all points, induced a law in England by which every matter was required to be specially pleaded, even in assumpsit. This relaxation, neither in England or America, ever extended to the action of trespass (*Austin v. Norris*, 11 Vt. 38).

Where the statute provides that a written notice of facts relied upon in defense may accompany the general issue, it follows that if the evidence given under such notice establishes a legal defense, the issue must be found for the defendant, although, in the outset, the plaintiff may have fully made out his cause of action (*Paige v. Smith*, 13 Vt. 251).

Where an alleged trespass requires a denial or refutation, which the defendant refuses to make, it is presumptive evidence of the truth of the charge (*Wheat v. Croom*, 7 Ala. 349).

* Matters which do not directly contradict that which a plaintiff is bound to prove in an action of trespass under the general issue, but which show collaterally that the action is not maintainable, must be specially pleaded, or a brief statement thereof filed under the statute. Therefore, in an action of trespass for killing a horse, the defendant cannot under the general issue be permitted to prove that he acted in self-defense (*Stow v. Scribner*, 6 New Hamp. 24).

An act done by authority must be specially pleaded (*Martin v. Clark*, 1 Hemp. 259).

In an action of trespass, an arbitration and award must be specially pleaded, and cannot be proved under the plea of accord and satisfaction (*Hubbert v. Collier*, 6 Ala. 269).

The right of possession must be pleaded under the general issue, and not specially (*Sage v. Keesecker*, 1 Morris, 338).

Under the plea of not guilty, in trespass, and notice of a former recovery by

§ 83. If a defendant, in justification of a trespass, relies either on an authority in law or in fact, it is sufficient to set forth this authority in his plea. If, by an abuse of an authority in law, he becomes a trespasser *ab initio*, or if an authority in fact is exceeded, so as to be no justification for what was done further than the authority warranted, such abuse or such excess must be set forth in a replication. A defendant may, however, in his plea, set forth such proceedings on his part as will show him to be a trespasser *ab initio*. As if in justifying the taking on an execution or warrant for the collection of taxes, he should state that he sold the property taken at private sale, the plaintiff might demur, and it would not be necessary to point out the abuse by a replication. But if, in stating his proceedings after the taking, he neglects to state those steps which he ought to have taken in order to render his proceedings regular, it is a mere omission; and as it was not necessary for him to set forth anything more than would justify the taking, so, if he neglect to state his after proceedings, or states them defectively, he is not on that account to be treated as a trespasser from the beginning.¹

§ 84. A former recovery must be specially pleaded.² A recovery in trespass is a bar to an action brought for a trespass committed prior to the commencement of the action in which the recovery was had; otherwise, it would be in the power of a party to split up trespasses and multiply actions for every distinct act.³ * In *White v. Mosely*,⁴ it was held, that when there are distinct torts committed consecutively, but in different places, and the plaintiff brings his

the defendant in a suit for the same cause of action, the proof must be such as would support a good plea in bar, if pleaded specially (*Clark v. Harrington*, 4 Vt. 69).

¹ *Andrews v. Chase*, 5 Vt. 409.

² *Young v. Rummell*, 2 Hill, 478; s. c. 5 Hill, 60; *Hahn v. Ritter*, 12 Ill. 80.

³ *Fields v. Law*, 2 Root, 320; *post*, § 102.

⁴ 8 Pick. 356.

* In an action against several, an answer setting up a former recovery against one, to be good, must aver actual satisfaction (*Wehle agst. Butler*, 43 How. Pr. R. 5; *Wies agst. Fanning*, 9 Ib. 543).

action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second action for the other act. But the case of *Trask v. Hartford & New Haven R. R.*¹ decided that a judgment in a civil suit upon a certain alleged cause of action was conclusive upon the parties in relation to it, and that another suit for the same cause could not be maintained for any purpose whatever. In that case, the claim for damages in the different actions was wholly distinct, the one being the loss of a shop and the other the loss of a dwelling-house. No damages had been claimed or recovered in the first action for the loss of the house; but the loss of each was caused by the same tortious act, and one recovery for any part of the damages caused by such act was held a bar to a second action. The court said that "it would be unjust, as well as in violation of the fixed rule of law, to allow the plaintiff to subject the defendants to the hazard and expense of another suit, to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof.

§ 85. Under a general submission of all matters existing between the parties, if a party withholds a part of his claim from the arbitration, he cannot, as a general rule, afterward enforce it against the other party to the submission. But as the cases on this subject proceed on the ground that the party is bound by his contract of submission to present the claim and have it adjudicated by the arbitrator, it does not operate to bar him from his remedy against one who was no party to the submission. Therefore the submission to arbitration of all matters existing between a creditor and debtor was held not to bar the debtor's remedy against an officer not a party to the submission who wrongfully attached and sold the debtor's only cow under a writ in favor of the creditor.²

¹ 2 Allen, 331.

² *Robinson v. Hawkins*, 38 Vt. 693.

16. *Replication.*

§ 86. The plaintiff need only traverse the substantial averments in the plea of justification. Where the defendant, justified under a prescriptive right to a duty called tensary, and to the like right to distrain for it, it was held that the plaintiff might traverse the right to the duty without traversing the right to distrain.¹ The defendant pleaded that disputes existing between him and the plaintiff, including the plaintiff's claim in respect of the alleged trespass, it was agreed by the plaintiff and defendant that the claims should be mutually relinquished, and that the defendant should pay to the plaintiff 5*l.*, as a final settlement and a full satisfaction and discharge of all the plaintiff's claims against the defendant, and, amongst other things, of all the damages sustained by the plaintiff by reason of the trespass; and that the defendant did, in pursuance of such agreement, before action, pay the plaintiff the said sum as a final settlement, and in full satisfaction and discharge of all claims, &c., and, amongst other things, of all damages, &c.; and that the plaintiff then accepted and received from the defendant, as such settlement, satisfaction and discharge, the said sum. It was held that a replication traversing the agreement, though not noticing the payment or acceptance, answered the plea.²

§ 87. Where the defendant pleads that he tendered to the plaintiff a certain sum, being sufficient amends, the plaintiff should reply that the defendant did not tender the sum named, or that the sum was insufficient, and not that he did not tender sufficient amends.³ A replication to a plea of property in the defendant, traversing the same, and averring property in the plaintiff, is irrelevant.⁴ If the trespass be continuing, consisting of a series of connected acts extending over a considerable period, the acts which constitute the entire trespass are divisible, and may be replied to separately.

¹ Griffith v. Williams, 1 Wils. 338.

² Bainbridge v. Lax, 9 Q. B. 819.

³ Williams v. Price, 3 B. & Adol. 695.

⁴ Outcalt v. Darling, 1 Dutcher, N. J. 443.

Accordingly, where the declaration alleged that the defendant entered the plaintiff's house, and stayed therein four days, and the defendant pleaded that he had a right to enter and stay two days, to which the plaintiff replied, denying his right to enter at all, but alleging that if he had a right, it was to stay two days only, and that he had stayed two days more without any color of authority, it was held that the trespass was divisible and the replication good.¹

§ 88. It is not necessary to reply excess in every case, where the allegations in the declaration are covered by a plea of justification. Evidence of acts consistent with the declaration, but not within the justification, may be given under *de injuria*.² A general replication *de injuria*, however, is bad when the defendant insists on a right, and is good only when he pleads matter of excuse, but it will be cured by the verdict.³

17. *New assignment.*

§ 89. A new assignment is employed to ascertain with precision, what has been alleged only generally in the declaration. It is used to explain that more fully which is only apparently answered by the plea. A very common instance of its use is when the plaintiff has declared generally for a trespass to his close in a certain town, without a particular description of the boundaries; and the defendant justifies an entry into a close in that place, describing it, which is, in fact, not the close the plaintiff intended. Where the parties agree as to the place, the plaintiff cannot new assign with reference to that.⁴ The necessity for a new assignment in any case is not so much for the purpose of giving information to the defendant and enable him to meet the charge and prevent his being misled, as to conform to the technical rules,

¹ Loweth v. Smith, 12 M. & W. 582; Worth v. Terrington, 13 M. & W. 781.

² Reece v. Taylor, 4 Nev. & M. 469; 1 Har. & W. 15.

³ Lytle v. Lee, 5 Johns. 112.

⁴ 1 Chitty's Pl. 413; 1 Wms. Saund. 299 b, note; Ib. 300.

pleadings and practice of the court. It is unknown in equity and admiralty. In New York it is superseded by the Code.¹

§ 90. Where there is a new assignment by the plaintiff, without denying the special plea, the plaintiff is restricted to such trespasses as are newly assigned.² The plaintiff in an action of trespass charged two distinct acts of trespass, which the defendant in his plea undertook to justify; whereupon the plaintiff newly assigned another trespass, which he averred was different from those mentioned in the plea; and to the trespass newly assigned, the defendant pleaded not guilty. It was held that the plaintiff was bound to prove another and different trespass from those charged in the writ, and that if the plea in justification was insufficient, he should have traversed it or demurred.^{3 *}

§ 91. Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification, and also newly assign either the same or different matters; such replication and new assignment being double.⁴ And the objection is sufficiently indicated by stating as special cause of demurrer, that the plaintiff had attempted to put in issue several distinct acts.⁵ A replication *de injuria*, with a new assignment that the defendant committed the trespass with more violence and in a greater degree than was necessary for the purposes in the plea mentioned, is demurrable.⁶

¹ Stewart v. Wallis, 30 Barb. 344.

² Bragg v. Wetzel, 5 Blackf. 95.

³ Boynton v. Willard, 10 Pick. 166. See Am. Jurist, Vol. II, where this case is doubted.

⁴ Stults v. Buckelew, 4 Dutcher, N. J. 150; Taylor v. Smith, 7 Taunt. 156.

⁵ Cheasley v. Barnes, 10 East, 73. See Thomas v. Marsh, 5 Car. & P. 596; Gisborne v. Wyatt, 1 Gale, 35; Worth v. Terrington, 13 M. & W. 781.

⁶ Ibid.

* The second count in trespass being a general one, will not always obviate the necessity of a new assignment (Smith v. Milles, 1 T. R. 480). There can only be a new assignment where there is a special plea (Ib.).

18. *Right to open and close.*

§ 92. Where the defendant by his plea, admits the whole cause of action stated in the declaration, and undertakes to remove or defeat it by new matter set up in his bar—as when in trespass to land, the defendant acknowledges the act, and claims in his plea the soil and freehold in himself or some one under whom he acts—he has the affirmative or primary burden of proof, and the right to open and close at the trial.¹ In a case in Massachusetts,² a new trial was granted because this privilege was denied to the defendant in the court below, notwithstanding the verdict appeared to be right.

19. *Evidence.*

§ 93. If affirmative pleas are pleaded with the general issue, the plaintiff may, if he choose, give in evidence any matter which goes to destroy the justifications so pleaded, by way of anticipating the defense. Or he may content himself with proving the facts charged in the declaration, and let the defendant make out what he can in justification, and trust to answering it by evidence in reply. But if he does this, he will be restricted to such evidence as goes to answer the case attempted to be made out by the defendant in support of his pleas.³ Where a justification is pleaded to which the plaintiff new assigns that the action is brought for another and different trespass than that mentioned in the plea, and not guilty is pleaded to the new assignment, if the plaintiff give in evidence only one trespass, it is incumbent on him to show that the trespass so given in evidence, is clearly a different one from that mentioned in the plea; if the circumstances are alike, the jury ought to consider it to be the same.⁴

¹ Seavy v. Dearborn, 19 N. Hamp. 351; Ayer v. Austin, 6 Pick. 225; *post*, § 243.

² Davis v. Mason, 4 Pick. 156. See Sedgwick on Damages, 6th ed. 738, 739, 740.

³ Pierpont v. Shapland, 1 Car. & P. 447.

⁴ Darby v. Smith, 2 M. & Rob. 184.

§ 94. The plaintiff may in general recover without proving the whole declaration, provided he proves so much of it as would, standing alone, constitute a good ground of action. There is an exception to the rule where the count contains matter of description, and in consequence of proving only a part, the proof does not correspond with the allegation. In the latter case, the variance will be fatal.¹

§ 95. All of the circumstances accompanying the trespass, and which were a part of the *res gestæ*, may be proved in order to show the temper and purposes with which the trespass was committed, and the extent of the injury.² If special damage be alleged, such special damage may also be given in evidence. But the opinions of witnesses as to what amount in money such damage should be estimated at, are not admissible. That belongs to the jury.^{3*}

§ 96. The time when the trespass was committed need not in general be proved as alleged, the plaintiff being at liberty to prove a trespass at any time before action brought, whether before or after the day laid.⁴ If the trespass be laid on divers days between two dates, the plaintiff may prove several acts of trespass of the nature laid in the dec-

¹ Howe v. Wilson, 1 Denio, 181; Ricketts v. Salwey, 2 Barn. & Ald. 360.

² Ogden v. Gibbons, 2 South. 518; *post*, § 598.

³ Duff v. Lyon, 1 E. D. Smith, 536.

⁴ Terpenning v. Gallup, 8 Clarke Iowa R. 74; *ante*, § 73.

* Where it appeared that the wife of the plaintiff was insulted and harmed, it was held that although that might be shown, yet that the jury could not allow damages for it, as she might, by joining with her husband, bring a separate action for such injury (Cook v. Garza, 9 Texas, 358).

In an action of trespass, the certificate of damages of appraisers chosen by the parties was held admissible in evidence, the appraisers having been previously examined (Crane v. Sayre, 1 Halst. 110). In Duff v. Lyon, *supra*, it was said that as the defendant cross-examined the witness as to the items of his estimate of damage, he thereby made the evidence his own. But it was held that the question having been admitted by the court in the direct examination, the defendant had a right to test the correctness of the answer, after exception, by a cross-examination, without losing the benefit of the exception. It was also said, that the testimony was that of experts, and therefore admissible. But it was held that no such doctrine was applicable to evidence of this kind. "I know not," said Ingraham, J., "any particular skill to be obtained by persons in estimating damages arising from a trespass, unless it be from having been sufferers from similar acts on former occasions, which is not the kind of knowledge required from an expert."

laration committed between these two dates;¹ or at his option, may give evidence of a single trespass committed at some other time; but he cannot do both.² And where in an action against several, the plaintiff fails in proving a joint trespass by all on the day he first selects, he may abandon that trespass, and prove a joint trespass at another time.³*

§ 97. The laws of one State of the Union with respect to another State are placed upon the same ground as the laws of a foreign country. Whenever they are brought in question, they must, in both instances, be proved as other facts.⁴

¹ Myrick v. Downer, 18 Vt. 360.

² 1 Archb. N. P. 406; 3 Stark. Ev. 4th Am. ed. 1441; 2 Greenlf. Ev. §§ 229-624; Pierce v. Pickens, 16 Mass. 470; Powell v. Bagg, 15 Gray, 507; Joralimon v. Pierpont, Anthon's N. P. R. 59.

³ Sedley v. Sutherland, 3 Esp. 202; Tait v. Harris, 6 C. & P. 73; Roper v. Harper, 5 Scott, 250; 4 Bing. N. C. 20.

⁴ Church v. Hubbard, 2 Cranch, 187; Consequa v. Willings, 1 Pet. C. C. R. 225; Brackett v. Norton, 4 Conn. 518; Talbot v. Seaman, 1 Cranch, 1; Brush v. Scribner, 11 Conn. 407.

* The rule at common law required that the first day should be laid in the declaration anterior to the first wrongful act, and the plaintiff would not be permitted to give in evidence repeated acts of trespass, unless committed during the time laid. But he might prove a single act of trespass upon the first day named. In such case, he was confined to that act; and the averment of the several trespasses after the first day named, was treated as surplusage. In New York, so long as the averment *in continuando* was relied upon and regarded as a part of the declaration, any evidence of acts not embraced within the description was inadmissible on the ground of variance. But now, under the Code, §§ 169, 170, which rejects all variance between the allegation in a pleading and the proof, unless it has actually misled a party to his prejudice, although trespasses are laid with a *continuando*, and several acts of trespass within the time alleged are proved, the plaintiff may prove another act anterior to the day stated as the commencement of the trespass (Dubois v. Beaver, 25 N. Y. 123). "The old rule was in the highest degree technical, and without much foundation in reason. That rule, where the trespasses were laid with a continuance, forbade the introduction of evidence of trespasses, unless committed within the space of time laid in the declaration, provided acts of trespass within that period had been already proved. But if they had not been, then it was allowable to give evidence of an act of trespass earlier than the first day named in the declaration. I think that rule, so far as it rests upon the technical foundation above mentioned, ought not to be enforced under the Code—at least, as a rule of unbending rigor; but that the decision should turn upon the materiality of the variance from the allegation in the complaint, and the question whether the opposite party has been misled or will be prejudiced by the admission of the testimony" (Relyea v. Beaver, 34 Barb. 547, per Hogeboom, J.). In Maine, the action being for taking a yoke of cattle, it was insisted that there was a variance between the allegation in the writ and the proof as to the identity of the property taken—that the writ alleged that the defendants took the plaintiff's oxen July 1st, while the proof showed that they were taken July 16th. But it was held that the precise time of taking was not material, if it was within the statute of limitations (Allen v. Archer, 49 Maine, 346).

In *Dyer against Smith*,¹ which was an action for false imprisonment, the defendant was a justice of the peace in the State of Rhode Island, and, as such, had rendered judgment by default against the plaintiff, issued an execution, and caused the plaintiff to be committed to jail. The plaintiff claimed that the judgment was rendered after the suit had been discontinued, and consequently was invalid, and afforded no protection to the defendant. The validity of the judgment depended upon the laws of Rhode Island. It was held that what those laws were, was a question of fact to be proved before the jury, and that the courts of Connecticut could not take notice of them.

§ 98. It is competent for the jury to consider the words which the defendant used subsequent to the trespass, in arriving at a conclusion whether or not he was a joint trespasser with those actually committing the mischief.² And where a community of design is established, the acts of each of the parties, and their declarations at the time of committing the injury, are evidence against each.³

§ 99. Evidence is admissible which implicates only one of two defendants sued for a trespass;⁴ and the plaintiff is bound to elect, before the defendants open their case, against which defendant he will proceed.⁵ But after a joint trespass is proved, the unconnected and distinct acts of some of the defendants cannot be given in evidence.⁶ If there were a number of distinct trespasses, in some of which only a part of the defendants participated, the plaintiff can recover against all the defendants for those acts only in which all were concerned.⁷ Where upon proof of a trespass affecting

¹ 12 Conn. 384.

² *McLaughlin v. Pryor*, 4 Scott, N. R. 655; 1 Car. & M. 354; 6 Jur. 374.

³ *Colt v. Eves*, 12 Conn. 243; 2 Stark. Ev. 403; 1 East's Pl. C. 97.

⁴ *Fox v. Jackson*, 8 Barb. 355.

⁵ *Howard v. Newton*, 2 M. & Rob. 509; see *White v. Hill*, 9 Jur. 129.

⁶ *Higby v. Williams*, 16 Johns. 215.

⁷ *Myrick v. Downer*, *supra*; *Snodgrass v. Hunt*, 15 Ind. 274; *M'Carron v. O'Connell*, 7 Cal. 152.

different defendants, the counsel for the plaintiff elects to proceed as to the trespasses affecting two only, he cannot afterward proceed, even as against those defendants, on other trespasses affecting all.¹ The defendants against whom the counsel abandons the case, ought not, however, to be acquitted, until the special pleas in which they have joined are disposed of.² Where in a joint action of trespass against six defendants, the plaintiff proved a joint trespass committed by them all, and then went on to prove another act of trespass by three of them, expecting to connect the other three with this also, but failed in so doing, it was held that the latter three were entitled to be acquitted before the defense was opened, as the plaintiff must be taken to have elected to waive the joint trespass, and to have gone on against those three for the second trespass only.³

§ 100. In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is for the jury to determine whether the trespass proved is the same as that confessed; but the plaintiff cannot be nonsuited.^{4 *}

§ 101. Where in an action of trespass against several, there is a joint plea of not guilty, and it appears that there are some defendants against whom no evidence has been given, they may be discharged, or rather acquitted, and examined as witnesses for the other defendants.^{5 †} A distinction

¹ Prichard v. Campbell, 5 Ind. 494.

² Hitchen v. Teale, 2 M. & Rob. 30.

³ Wynne v. Anderson, 3 Car. & P. 596.

⁴ Harris v. Butterly, Cowp. 483; Weller v. Goyton, 1 Burr. 358; Johnson v. Vutrick, 14 Ind. 216.

⁵ Wakeman v. Lindsey, 19 L. J. Q. B. 166; Church v. De Wolf, 2 Root, 282.

* In personal actions, the nonsuit of one is the nonsuit of all the plaintiffs. Accordingly where in an action of trespass, three of the plaintiffs presented to the court a petition, stating that the action was brought without their consent or knowledge, and stating that they became nonsuit, it was held that the nonsuit extended to all the plaintiffs (Caverly v. Jones, 3 Fost. 573; citing Kimball v. Wilson, 3 N. Hamp. 101; Wilson v. Mower, 5 Mass. 411; Webb v. Steele, 13 N. Hamp. 230; Eastman v. Wright, 6 Pick. 316).

† In New York, subsequent to the enactment of the statute providing that a party may be examined in behalf of his coplaintiff or codefendant as to any mat-

has been made between a joint plea of the general issue, and a joint plea of justification. In the latter case, if the plea is

ter in which he is not jointly interested or liable with such coplaintiff or codefendant, and as to which a separate and not joint verdict or judgment shall be rendered (Laws of N. Y. of 1851, p. 903, § 397), in an action for an assault and battery, charged to have been committed upon the plaintiff by five persons, the judge at the circuit refused to permit each defendant to testify for his codefendant. But the Court of Appeals (Beal against Finch, 11 N. Y. 128), in reversing the judgment, said : " Though this section is not expressed in very clear terms, it seems to me there can be no doubt as to its meaning. Of course, it can be applicable only when defendants are sued jointly. There can be codefendants in no other case; and it declares as to what matters a defendant, thus jointly sued with others, may be a witness for his codefendant. It is as to a matter in which he is not jointly interested, and as to which a separate judgment may be rendered. He is a competent witness in all cases where sued jointly, but only as to certain matters. He may prove that his codefendant was not present, or if present, that he took no part in the assault and battery; or any other separate defense of his codefendant. As to such a matter, surely he, the witness, has no interest, and cannot therefore be jointly interested with his codefendant; and as to such matter, a verdict or judgment which is separate, and not joint, can be rendered. * * * In every action for assault and battery, and in all other cases of tort, a verdict and judgment may be rendered in favor of one and against another defendant; that is, in the language of the act, a verdict or judgment, separate and not joint, may be rendered. In such an action, then, a party may be examined for his codefendant as to any matter as to which a separate and not joint verdict or judgment can be rendered, and as to any matter in which he is not jointly interested or liable with such codefendant. * * * There are many things which the witness excluded in this case might have proved, that would have constituted a separate defense for the other defendants, and as to which the witness had no interest. He might have proved that the other defendants were not present, or took no part in the rencontre, or that the plaintiff struck first, and that they acted only in self-defense. Any of these matters would constitute an entire and perfect defense for the other defendants for whom he would have testified, and would have been entirely distinct and separate from the defense of the witness. The witness might still have been found guilty, and the other defendants, on his testimony, might be acquitted. So, too, the witness would have been competent to testify as to admissions of the plaintiff, or as to any personal defense arising out of subsequent transactions, such as accord and satisfaction, &c., if it had been put in issue by the pleadings. Upon the mere question of mitigation, where a cause of action is clearly made out against all the defendants, I do not see how one defendant can be a competent witness for his codefendant, for that is a matter as to which he is jointly interested with his codefendant, and it is therefore within the exception made by the statute. * * * If, however, the case made out against the defendant who is called as a witness is a doubtful one, I see no objection to receiving his testimony to mitigate damages for his codefendants, under proper instructions to the jury to consider it if they acquit the witness, and to reject it if they find him guilty." Denio, J., at the close of a long dissenting opinion, in the course of which he took strong ground against the propriety of admitting parties to testify, said : " In a large class of litigated cases, especially in actions like the one under review, the parties come to the trial with minds excited by interest, prejudice, and passion. A system which shall invite them to take the stand as witnesses against each other, will offer a premium to the practice of dissimulation, craftiness, and perjury; and will, in my judgment, inflict an injury to public morals which no fancied advantage can, in any degree, atone for. The notion of limiting the application of the testimony to the case of the other parties jointly charged with the witness, would be found, in most cases, entirely

not supported as to all, neither of the defendants can be protected under it.¹ If there be any, even the slightest evidence against the defendant, he cannot be discharged before the rest, but the entire case must go to the jury.² It is in the discretion of the judge to defer taking an acquittal of one of several defendants until all the evidence in favor of the other defendants has been gone through;³ and in England, this is the usual practice.⁴ Where it is in the least probable that evidence which will be given for the other defendants may fix the defendant with liability, the judge will not allow his acquittal at the end of the plaintiff's case.⁵ The court may, in its discretion, direct the trial of one of the defendants first, when it appears that there is no substantial evidence against him; and if acquitted, he may be a witness for the other defendants.⁶ * An acquittal is allowed to avoid the

illusory. The present action furnishes as good an illustration of that point as any other. Here were five defendants charged with a joint assault and battery upon an individual. Testimony from indifferent witnesses had made out a *prima facie* case. It is therefore probable that a personal conflict of some character had taken place, and that the question was as to which party was the aggressor, the plaintiff or the defendants. Then it is proposed that each defendant shall give his account of the matter on oath, not professedly as evidence in his own behalf, but as a witness for the others; and the jury, sitting without the conveniences for taking minutes, and not possessing habits to qualify them for making a discriminating analysis of the evidence, are expected to give a verdict upon the case of each defendant—not upon the general merits of the conflict, according to all the testimony—but by applying to each defendant a history of the occurrence, of a different character, it may be, from that which is to be applied to each of the others. This would be sufficiently intolerable if the plaintiff's account was also to be heard; but he, unfortunately, having no associate on the record, must submit to be silent, and have the case determined upon the oaths of the very individuals whom he has prosecuted for an outrage upon his person."

¹ Schermerhorn v. Tripp, 2 Caines, 108; Drake v. Barrymore, 14 Johns. 166.

² Brown v. Howard, 14 Johns. 119; Hoar v. Clute, 15 Ib. 224; Leach v. Wilkinson, 1 M. & Rob. 537.

³ White v. Hill, 14 L. J. N. S. 79; 9 Jur. 129.

⁴ Ibid.

⁵ Spencer v. Harrison, 2 Car. & K. 429.

⁶ Sawyer v. Merrill, 10 Pick. 16; Dorrell v. Johnson, 17 Pick. 263; but see Dougherty v. Dorsey, 4 Bibb. 207.

* In an action of trespass against three, two of whom only are served with process, the one not arrested is a competent witness for the other two (Stockham v. Jones, 10 Johns. 21).

In an action of trespass against three, one of the defendants pleaded the general issue. The other defendants, although they appeared on the return of the writ, put in no plea. A jury having been sworn to try the issue joined, rendered a verdict for the plaintiff. It was held that this was equivalent to the formal entry of a *nolle prosequi* as to the defendants not pleading, or as a verdict acquitting them; and that an entry on loose memoranda kept by the clerk of the

consequences of the improper joinder by the plaintiff of defendants, merely for the purpose of excluding their testimony; but the want of evidence must be so glaring and obvious as to afford strong grounds of belief that the party was arbitrarily made a defendant to prevent his being a witness.¹

§ 102. Proof that the same acts of alleged trespass have already been put in issue between the same parties, and a judgment rendered thereon upon a trial on the merits, will constitute a perfect defense.² Thus, where the plaintiff, in his declaration, alleged that the defendant beat the plaintiff's head against the ground, and that the plaintiff brought an action for assault and battery for that, and recovered damages, and that, since the recovery of such damages, by reason of the same battery, a piece of the plaintiff's skull had come out, and the defendant pleaded, in bar, the recovery mentioned in the declaration, and averred it to be for the same assault and battery, and the plaintiff demurred, and it was urged that this subsequent damage was a new matter, which could not be given in evidence in the first action, when it was not known, it was held that the recovery of damages in the first action was an absolute bar to any subsequent action for the same battery.³ *

court, that the jury were sworn in a suit against the defendant, who pleaded, and others, could not be treated as a part of the record or inconsistent with it, the presumption being that the jury were properly sworn (*Breidenthal v. McKenna*, 14 Penn. St. R. 160).

A defendant in trespass, who has suffered judgment by default, is not a competent witness for his codefendant, where the jury are summoned as well to try issues against the one as to assess the damages against the other (*Thorpe v. Barber*, 5 C. B. 675).

In an action of trespass against three, who had all jointly, and by one attorney, pleaded "not guilty by the statute," the judge at Nisi Prius would not, on the application of the plaintiff's counsel just before the jury were sworn, allow a *nolle prosequi* to be entered as to one of the defendants, in order that he might be called as a witness for the plaintiff. Neither would the judge, immediately after the jury were sworn, allow one of the defendants to be acquitted on the application of the plaintiff's counsel, it being stated by the defendant's counsel that he appeared for all the defendants and objected to such acquittal (*Spencer v. Harrison*, 2 Car. & K. 429).

¹ *Brown v. Howard*, *supra*; *Bates v. Conkling*, 10 Wend. 389; *Moon v. Eldred*, 3 Hill, 104, *n. a.*

² *Emery v. Fowler*, 39 Maine, 326; *Marsh v. Pier*, 4 Rawle, 288; *ante*, § 84.

³ *Fetter v. Beale*, 1 Salk. 11.

* "The rule that a judgment is conclusive upon a matter directly in issue

§ 103. The technical rule that a judgment can only be admitted between the parties to the record or their privies, is modified so far as to render it admissible when the same question has been decided and judgment rendered between persons responsible for the acts of others. A familiar example is presented in suits against a sheriff or his deputy, which, being determined upon the merits, against or in favor of one, will be conclusive upon the other.¹ So, likewise,

upon a former trial is sometimes difficult of application. Any fact attempted to be established by evidence, and controverted by the adverse party, may, in one sense, be said to be in issue. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue. It may be the only matter put in controversy by the evidence; but it is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue. But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied. The deed comes in controversy directly, in one sense; that is, in the course taken by the evidence it is direct and essential. But, in another sense, it is incidental and collateral. It is not a matter necessary of itself to the finding of the issue. It may be made so by the parties. There are cases which conflict to some extent with the principle we have thus stated; some of them holding that, in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted that under such a record any particular matter came in question; while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself, provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question, and passed upon by the jury" (King v. Chase, 15 N. Hamp. 9). In this case, Parker, C. J., in referring to Jackson v. Wood, 3 Wend. 27; s. c. in error, 8 Wend. 9, said: "While, on the one hand, we do not, with the Supreme Court (of New York), deem it essential that the record should of itself show that the matter was in issue, in order to make the determination of it conclusive, we are of opinion, on the other, that the general principle laid down in the Court of Errors is too broad in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence, under the issue joined, and such that when proved to have been given in evidence, it is manifest, by the verdict and judgment, that they must have been directly and necessarily in question, and passed upon by the jury; and this must include all matters which come in question collaterally by the evidence offered, if they were of such a nature as that it appears the jury must or should have passed upon them."

¹ Ferrers v. Arden, Cro. Eliz. 668; Kennersley v. Orpe, Dougl. 517; Strutt v. Bovingdon, 5 Esp. 56; Thurman v. Wild, 11 Ad. & El. 453; Rogers v. Haines, 3 Greenl. 362; White v. Philbrick, 5 Ib. 147.

where a judgment has been rendered against the master for the trespass of his servant, it will bar an action against the servant for the same trespass.¹

§ 104. Satisfaction of judgment against one of several joint trespassers will be a bar to an action by the same plaintiff previously commenced against another of the joint wrong-doers for the same trespass.* Where it appeared that the defendant and one Libbey had jointly thrown down the plaintiff's fence, for which the present action was brought, and that afterward the plaintiff brought another action for the same trespass against Libbey, and recovered judgment, which was satisfied; it was held that, on the recovery by the plaintiff of the judgment against Libbey, the claim for damages was canceled as effectually as is would have been by an instrument acknowledging payment, and by a valid contract of discharge; and that the pendency of the action against the cotrespasser did not change the principle.² The court remarked that perhaps it was in the power of the plaintiff to have omitted to take his judgment against Libbey after the verdict, and to have obtained a judgment in the present action for the same damages and costs; but that as he had not done so, the foundation of this action was taken away by the plaintiff's own acts, and no damage could be awarded for what had been satisfied by payment.

§ 105. It is scarcely necessary to say that a recovery in a former action apparently for the same cause, is only *prima facie* evidence that the subsequent demand has been tried;

¹ Emery v. Fowler, 39 Maine, 74.

² Mitchell v. Libbey, 33 Maine, 74.

* A judgment against two or more for a joint trespass will not bar an action against one of them for a several trespass (Davis v. Caswell, 50 Maine, 294).

A party may omit to assess his damages on one of several distinct counts for acknowledged distinct causes of action, and if he does so, a judgment for damages upon the other causes of action will not bar a second suit for the causes of action for which no damages were assessed (Goodrich v. Yale, 8 Allen, 454). Per Dewey, J., citing Seddon v. Tutop, 6 Term R. 607, in which there were two distinct counts, one on a promissory note, and the other for goods sold, set forth in distinct counts, and not in the least blended.

and that the test to apply is, whether the same evidence will support both actions.¹

§ 106. Proof that the plaintiff received money in consideration of the release of a codefendant is admissible in mitigation of damages.² But what is done by way of settlement or compromise with some of several trespassers is not admissible for the purpose of affording a measure or rule of damages as to the rest. "It is quite as probable that the plaintiffs fixed the sums they would insist upon from the defendants' cotrespassers, with reference to their opinion of the degree of relative culpability to be attached to them, as with reference to their own injury. The defendants being legally liable for the whole, are not entitled to complain that the plaintiffs do not pursue others, or have collected less of others than they seek to recover of them. It is their good fortune that the plaintiffs have collected anything of others. If the plaintiffs have not been fully satisfied for the wrong done them, the defendants can only insist that whatever their cotrespassers have done toward it shall apply *pro tanto*, and they are liable for the balance."³

§ 107. Whether the plaintiff shall be permitted to call further witnesses after the defendant has rested, to give merely cumulative testimony to the very facts alleged in the complaint, is a matter within the discretion of the court; and the exercise of that discretion—unless in case of very palpable and gross injustice—will not be ground for reversal.⁴ *

¹ Seddon v. Tutpot, 6 Term R. 607; Kitchen v. Campbell, 3 Wils. 304.

² Bloss v. Plymale, 3 W. Va. 393.

³ Chamberlin v. Murphy, 41 Vt. 110.

⁴ Silverman v. Foreman, 3 E. D. Smith, 322.

* In Silverman v. Foreman, *supra*, which was an action for assault and battery, the main ground upon which a reversal was sought, on appeal, was, that after the plaintiff had rested the case upon the evidence of his witnesses, who testified to the blow, and after the defendant had called and examined witnesses to disprove the striking, the court refused to permit the plaintiff to call witnesses to prove that the defendant had admitted that he struck the plaintiff. It was held that in this there was no error. The court said: "Counsel misapprehend, I think, the meaning of the term rebutting evidence in such a case. It means not merely evidence which contradicts the defendant's witnesses, and corrob-

§ 108. If an objection on account of variance between the declaration and the proof be not taken at the trial, it will be considered as waived.¹ A party is at liberty, if he please, to waive objection to irrelevant testimony, when offered by his adversary, from the mouth of one witness, and to object to evidence of the same facts when offered from another source. If irrelevant, it is to be excluded by the court, when seasonably objected to, although like testimony may have been received because not objected to.²

§ 109. When there is any evidence, however slight, tending to establish a material fact, the sufficiency of the evidence to establish the fact is for the jury. But if there be no evidence tending to prove such fact, it is the duty of the court to instruct the jury to find for the defendant. And where the alleged facts do not in law amount to a trespass, the court should, on the defendant's motion, so instruct the jury.³

20. *Damages.*

§ 110. As the law presumes damage from every trespass, an instruction to the jury, that if no damage was done, they may find for the defendant, is error.⁴ An officer in levying upon machinery in a mill, in order to detach it from the bands which united it with the shafting, the bands not belonging to the owner of the machinery, cut instead of untying the thongs by which the bands were laced together. In an action of trespass against the officer, the judge charged the jury, that if they found that the thongs were old, worn out,

rates those of the plaintiff, but evidence in denial of some affirmative case or fact which the defendant has endeavored to prove. The plaintiff was strictly bound to prove the allegations in his complaint, and give so much testimony in support of those allegations, that as to them he was willing to trust his case upon the proofs given. The defendant then took the burden of rebutting that proof, and unless some reason was assigned for deviating from the rule, the court below rightly exercised their discretion in not permitting the plaintiff to open his case again, for the purpose of accumulating testimony to the very point to which he had already examined such witnesses as he thought proper."

¹ *McConihe v. Sawyer*, 12 N. Hamp. 396; *Chandler v. Walker*, 1 Fost. 282.

² *Dole v. Erskine*, 37 N. Hamp. 316.

³ *Crookshank v. Kellogg*, 8 Blackf. 256.

⁴ *Atwood v. Fricot*, 17 Cal. 37.

and nearly worthless, unless the defendant cut them wantonly, he ought not to be held liable for it; and that as the action appeared to be brought for the purpose of trying the defendant's right to enter the mill, and to take the machinery, he would not advise them to decide the case on some trifling damage in the above particulars, provided they found that the officer acted in good faith. It was held that the foregoing instructions were erroneous, the damage done to the thongs though small, being still susceptible of estimation.¹

§ 111. For an involuntary trespass, or a trespass committed under an honest mistake without intent to injure, the damages should be confined strictly to compensation for the injury sustained by the plaintiff.² But whether the defendant contemplated or not the actual result, he must be held to have intended all the damages which legitimately resulted from his illegal act; and in estimating the amount of such damages, all the particulars wherein the plaintiff is aggrieved, may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience.³ If the extent of the injury can be estimated in money, the plaintiff is entitled to recover for the whole damage, without regard to extenuating circumstances. Where however by his own act, he wantonly brings an injury on himself, and the jury refuse to find for him to the extent of his actual loss, a new trial will not be granted.⁴

§ 112. When the cause of action is not continuing, the prospective, as well as the present injury, may be taken into account, in estimating the damages. But the future injury must be the necessary and natural result of the wrong done, and not the consequence of any further wrongful act giving rise to a fresh cause of action.⁵

¹ Fullam v. Stearns, 30 Vt. 443.

² Allison v. Chandler, 11 Mich. 542; Dibble v. Morris, 26 Conn. 416; Beecher v. Derby Bridge & Ferry Co. 24 Ib. 491.

³ Allison v. Chandler, *supra*; *ante*, §§ 14, 16.

⁴ Henderson v. Syles, 2 Hill, S. C. 504.

⁵ Richardson v. Mellish, 2 Bing. 240; Fetter v. Beal, 1 Ld. Raym. 339; s.

§ 113. The plaintiff may prove special damages when they are consequences of the act committed, or when the trespass causing the special damages, is a part of the entire transaction of which the principal trespass was the commencement.¹ Where special damages are not alleged in the declaration, the plaintiff can only prove such damages as are the necessary as well as proximate result, of the act complained of;—but where they are alleged, they may be proved so far as they are the proximate, though not the necessary result.²

§ 114. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative and contingent consequences which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully and leave the gate open; if before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without being repaired, a great length of time, after notice of the fact, and his furniture, or pictures, or other valuable articles sustain damage, or the rain beats in and causes the window to decay, this damage would be too remote.^{3 *}

§ 115. The damages are not confined to the mere pecuniary loss sustained by the plaintiff. For a wilful trespass,

c. 1 Salk. 11; Caldwell v. Murphy, 1 Duer, 233; aff'd 11 N. Y. 416; Blunt v. McCormick, 3 Denio, 283. See Plate v. N. Y. Cent. R. R. Co. 37 N. Y. 472; ante, § 22; post, § 278.

¹ Damron v. Roach, 4 Humph. 134; Snively v. Fahnestock, 18 Md. 391.

² 1 Chit. Pl. 6th ed. 441; 2 Greenlf. Ev. § 256; Dickinson v. Boyle, 17 Pick. 78; Brown v. Cummings, 7 Allen, 507.

³ Loker v. Damon, 17 Pick. 284.

* The jury cannot lawfully allow interest on damages assessed by them (Jean v. Sandiford, 39 Ala. 317).

or a trespass committed in reckless or wanton disregard of another's rights, or accompanied by circumstances of cruelty or oppression, or other particulars showing the existence of malice, or a corrupt motive, the jury may, and ought, not only to give compensation for the injury, but also further damages in view of the aggravated character which the trespass then assumes, usually called smart money, or exemplary damages.¹ * The expenses of the suit, which the jury are sometimes advised they may take into consideration in cases of wanton, malicious, and culpable injuries, are not in fact strictly recoverable by way of damages. They are only to be considered as a reasonable ground for increasing the damages in

¹ Tillotson v. Cheetham, 3 Johns. 56; Hoyt v. Gelston, 13 Ib. 141; Wort v. Jenkins, 14 Ib. 352; Brizsee v. Maybee, 21 Wend. 144; Tift v. Culver, 3 Hill, 180; Jay v. Almy, 1 Woodbury & Minot, 262; Amer v. Longstreth, 10 Barr, 145; Wilkins v. Gilmore, 2 Humph. 140; Duncan v. Stalcup, 1 Dev. & Bat. 440; Mitchell v. Billingsley, 17 Ala. 391; Churchill v. Watson, 5 Day, 140; Ously v. Hardin, 23 Ill. 403; Ives v. Humphreys, 1 E. D. Smith, 196; Dibble v. Morris, 26 Conn. 416; Linsley v. Bushnell, 15 Ib. 236; Huntley v. Bacon, Ib. 267; Lane v. Wilcox, 55 Barb. 615; St. Peter's Church v. Beach, 26 Conn. 355; Hawk v. Ridgway, 33 Ill. 473; *post*, § 281.

* While it may be conceded that there seems to be a want of legal force in the idea of compensation beyond the injury, by way of punishment for the evil motives of the trespasser, yet the law is well settled that it may be given. There are many things constituting property to an owner, the value of which to any one else, would be inappreciable; such, for instance, as a portrait, the mere pecuniary worth of which in damages would not afford the owner an adequate compensation for its destruction (see Nagle v. Mullison, 34 Penn. St. R. 48).

"There are very respectable authorities against the right of recovery, in trespass, of anything more than compensation to the plaintiff for the actual loss or damage he has suffered; and these authorities exclude all evidence of the intention, motive, and character of the defendant's offense, as immaterial. Other authorities, while they disclaim the right of jurors in a civil suit to give damages by way of punishment or example, because these belong to the government as a fine, instead of to the party injured as damages, still hold that the malice, wantonness and wilful cruelty of the defendant's act, are material, on the ground that the injury to the plaintiff is greater if he is subjected to the insult, indignity, and oppression of a wilful, premeditated, and unprovoked wrong, than when subjected to a wrong which arose *per infortunium*, from mistaken judgment, or even in the heat of natural anger. Still other authorities insist that the jury may allow damages by way of punishment, or smart money. This matter of damages in actions *ex delicto* has been the subject of much discussion and grave difference of opinion among jurists. But it is clear that it is of very little practical consequence to either plaintiff or defendant, if damages are allowed according to the wickedness or wilfulness of the act, whether they are allowed upon the ground that the wickedness and wilfulness of the act increases or aggravates the injury to the plaintiff, or upon the ground that the defendant should be punished in damages. Such damages, by the great weight of authority, and particularly of modern authority, are legitimate and matter of right in the discretion of the jury" (Steele, J., in Devine v. Rand, 38 Vt. 621).

order that the plaintiff may not be impoverished by the cost of the litigation necessary to obtain justice.^{1*} The propriety of their allowance would seem questionable when an action is brought for a tort which may also be prosecuted criminally.² But every circumstance which affected the plaintiff injuriously will properly enter into the question of damages.³

§ 116. Where a joint action is brought against two for a trespass, and there is a judgment against both, it must be a judgment for joint damages. All the legal consequences of there being a joint judgment must necessarily follow; one of which is that each is liable for all the damage which the plaintiff has sustained by such trespass, without regard to different degrees and shades of guilt.⁴ † In such an action, there was rendered the following verdict:—"We, the jury, find A. \$150, and B. \$100; all the costs to be paid by A. and B.; and fifty dollars damage to be paid by A." It was held that the legal effect of the verdict was, that the jury found \$200 damages against A.; and that a joint judgment must be entered against both defendants for that amount, and a *remittitur* be entered as to the \$100 found against B.⁵ In an action of trespass against three, the jury on one count of the declaration found two not guilty, and assessed the damage upon the third at six dollars. On another count, they found the three guilty, and assessed the damage at seven dollars and eighty-three

¹ Williams v. Ives, 25 Conn. 568; Blythe v. Tompkins, 2 Abb. Pr. R. 468; Parsons v. Harper, 16 Gratt. 64; *post*, § 277.

² See Bradlaugh v. Edwards, 11 C. B. 377.

³ Nossaman v. Rickert, 18 Ind. 350; Humphries v. Johnson, 20 Ib. 190.

⁴ Eliot v. Allen, 1 C. B. 18; Brown v. Allen, 4 Esp. 158; Hill v. Goodchild, 5 Burr. 2790; Clark v. Bales, 15 Ark. 452; Hair v. Little, 28 Ala. 236; Allen v. Craig, 1 Green, 294; Layman v. Hendrix, 1 Ala. 212.

⁵ Simpson v. Perry, 9 Geo. 508.

* In Ohio, it has been held that where compensatory damages are allowable the attorney fees and other necessary expenses of the plaintiff may be included in the estimate of damages (Cleveland &c. R. R. Co. v. Bartram, 11 Ohio, N. S. 457; Roberts v. Mason, 10 Ohio, N. S. 277).

† In case of several defendants, the damages should be assessed according to the most culpable (Berry v. Fletcher, 1 Dill. 67). But if the court instruct the jury to sever the damages, and assess what each defendant ought to pay, the error cannot be taken advantage of by a defendant, it not being to his prejudice (Crawford v. Morris, 5 Gratt. 90).

cents against each. The judge told the jury that the damages must be joint, and directed a verdict to be drawn up in proper form, for the aggregate of twenty-three dollars and forty-nine cents on the count on which they found against the three defendants; and it was held that there was no error.¹*

§ 117. If in an action of trespass against several defendants the jury assess several damages, the plaintiff may enter a *nolle prosequi* as to one of the defendants and take judgment against the others; or he may enter a *remittitur* as to the lesser damages; or he may take judgment against all the defendants for the greater damages *de melioribus damnis* without entering a *remittitur*. But if in such case the damages are separately assessed, and judgment is taken for the whole, it will be bad on error, and the judgment must be reversed.²†

¹ Fuller v. Chamberlain, 11 Metc. 503.

* 2 Tidd's Pr. 805; Heydon's Case, 11 Co. 5; Walsh v. Bishop, Cro. Cha. 239, 243; Rodney v. Strode, Carth. 19; Savin v. Long, 1 Wils. 30; Holley v. Mix, 3 Wend. 350; Halsey v. Woodruff, 9 Pick. 555; Johns v. Dodsworth, Cro. Car. 192; Crane v. Hummerstone, Cro. Jac. 118; Wallace v. Brown, 5 Fost. 216.

* Halsey v. Woodruff, 9 Pick. 555, was an action of trespass against A. and B. for entering the plaintiff's close and tearing down his shop. The jury found A. guilty, and assessed damages against him at two dollars; they also found B. guilty, and assessed damages against B. at seventy-five dollars. The plaintiff elected to take judgment against both defendants for seventy-five dollars, and entered a remittitur as to the two dollars. The Supreme Court in holding that judgment was rightly entered, said:—"The plaintiff here alleges a joint trespass. The defendants plead severally that they are not guilty—of what? Of the joint trespass; and they are found guilty—of what? Of the same joint trespass. Damages are assessed against one at seventy-five dollars. This therefore, by the finding of the jury, is the damage which the plaintiff has sustained, and the law draws the inference that both are liable for that sum. The inquiry of damages, though made by the same jury, when an issue in fact is tried, is in some degree collateral to the trial of the issue. Where there is judgment on an issue of law alone, there must necessarily be a distinct inquiry of damages, and then the question for the jury is only what damages has the plaintiff sustained by reason of the trespass done, without regard to the particular acts done by either of the defendants. So where the damages are found by the jury, on an issue in fact, the sole inquiry open to them is, what damages the plaintiff has sustained, not, who ought to pay them; and therefore their finding of separate damages is beyond their authority, and merely void. Suppose in an action against two for a joint trespass, one of the defendants demurs to the declaration, and the declaration is sustained, and the other pleads the general issue which is found against him and damages are assessed; judgment would be rendered that both were guilty, and execution would issue against both for the damages so found by the jury. On principle, as well as authority, the judgment entered in the case before us, was correct.

† Where in an action of trespass against several who plead jointly, the jury

§ 118. The jury may find one defendant guilty of a trespass at one time, and the other at another; or one of them guilty of a part of the trespass, and the other of another part; or some guilty of the whole trespass, and the others guilty of a part only; in all which cases several damages may be assessed.¹ * In *Proprietors of Kennebec v. Boulton*,² the declaration charged three distinct trespasses, but it appeared that each trespass was jointly committed by some of the defendants only. It was held that the damage for each trespass was rightly assessed jointly against those of the defendants who jointly committed it, and severally for the several trespasses; and that the plaintiff was entitled to full costs, to be taxed jointly against all the defendants, the costs being entire, and each of the defendants being responsible for them.

§ 119. If actions are separately brought against each of several defendants, they may all be pursued to final judgment, and the plaintiff may elect which of the separate judgments he will enforce. But his right of election will not be determined until he sues out execution, or accepts satisfaction of one of the judgments. Having, however, received the damages recovered against any one, and his costs recovered against all, he must be content with that, as otherwise he would receive more than one satisfaction for his injury.³ †

by mistake assess several damages, the plaintiff may cure the error by entering a *nolle prosequi* as to all but one, and taking judgment against him (*Crawford v. Morris*, 5 Gratt. 90).

¹ *Hill v. Goodchild*, 5 Burr. 2790; *Mitchell v. Milbank*, 6 Term R. 199; *Bohun v. Taylor*, 6 Cowen, 313; *Kempton v. Cook*, 4 Pick. 305; *Chase v. Lovering*, 7 Fost. 295.

² 4 Mass. 419.

³ *Stone v. Matherly*, 3 Monr. 136; *Blann v. Crocheron*, 20 Ala. 320; *Sodousky v. M'Gee*, 4 J. J. Marsh. 267; *Livingston v. Bishop*, 1 Johns. 290; *Knickerbacker v. Colver*, 8 Cowen, 111; *Sheldon v. Kibbe*, 3 Conn. 214; *Ayer v. Ashmead*, 31 Conn. 447.

* In Kentucky, in an action of trespass, separate damages may be assessed against each defendant, and the judgment several against each defendant for the damages assessed, and joint for costs against all who are found guilty (*Henry v. Sennett*, 3 B. Mon. 311).

† This was the rule laid down in *Sir John Heydon's Case*, 11 Co. 5, where in trespass against several one appeared and pleaded not guilty to a declaration against him, and afterwards another appeared and pleaded not guilty to a like declaration, whereupon separate *venires* issued, and the issues were separately

§ 120. When in an action against several defendants they are declared against jointly, they are only liable for acts jointly committed, although by agreement judgment by default has been entered against all of them.¹ But where all of the defendants were defaulted by agreement, and the case was referred to an assessor to ascertain the damages, it was held that all were liable for the entire damage, although the evidence submitted to the assessor showed that one of them was not guilty.² *

tried, and separate and different damages assessed, and the court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution. The case of *Brown v. Wotton*, Moore, 762, is opposed to this view. That was an action of trover, and the defendant having pleaded a judgment and execution in behalf of the plaintiff against one J. S. for the same goods, the plea was held good. The court made a distinction between the recovery of a thing certain and of a thing uncertain; and they held, in the first case, a recovery and execution against one was no bar against the other without satisfaction, but that where the demand rested only in damages, as in trespass, a recovery and judgment against one was a bar against the other, for the uncertain demand having been made certain by the judgment, the plaintiff could not resort to the uncertain demand again.

¹ *Folger v. Fields*, 12 Cush. 93.

² *Gardner v. Field*, 1 Gray, 151.

* In this case, the court said: "The only question open before the assessor was the amount of damages. Who were liable for such trespass as might be proved under the declaration, was settled by the admission upon the record. The plaintiff was not required to prove the joint liability of the defendants, and the defendants not at liberty to contest it. The trespass proved must be taken to be that declared on; and his joint liability with the other defendants Gibbs had admitted. The rule *de melioribus damnis* applies, and Gibbs is liable for the whole damage, not upon the evidence, but upon his admission."

In case judgment is taken by default, a writ of inquiry must be issued for the summoning of a jury and the assessment of the damages before the sheriff. The plaintiff must then introduce evidence as to the extent of the injury; and it is the duty of the sheriff to instruct the jury as to the grounds and measure of compensation (*Chitty Arch. Pr. Inquiry*; *Penny, in re*, 7 Ell. & Bl. 668).

"In this State" (New Hampshire) "we have no practice like that in England and New York, of issuing a writ of inquiry and summoning a special jury to assess the damages; but where a default has been entered, the court assess the damages, unless for some special reason they order an inquiry into the damages by the jury. Should that be done, the matter would be committed to one of the regular juries in attendance upon the court, by whom it would be tried in the same manner as common cases, with the exception that the trial and verdict would be confined merely to the amount of damages. And where one defendant is defaulted and another defends, there is not, in point of form, any inquiry of damages against the one defaulted; but in practice the jury do, in effect, assess the damages if they find against the other defendant. Judgment is rendered against both for the amount of damages assessed by the jury. If the one who defends obtains a verdict, then damages are assessed on the default, as if there had been originally but a single defendant (*Eastman, J., in Chase v. Lovering*, 7 Fost. 295, citing *Bowman v. Noyes*, 12 N. Hamp. 307.)

21. *Costs.*

§ 121. Where separate actions of trespass are brought against several, the plaintiff may enter up his costs in all of the suits.¹ In New York, in an action against two for wilful injury, if the plaintiff has a verdict which carries costs against one defendant, and the other is acquitted, the latter is entitled to full costs. This results from the fact that the statute gives costs to the defendant acquitted, and prescribes no rule of apportionment. But where the defendants appear by the same attorney, and all of them are acquitted, they cannot tax separate bills of costs; and the rule is the same where, although there is a verdict against one defendant, the case is such that they both recover costs.² In Massachusetts, where in an action of trespass against several, judgment was rendered, in the first instance, against all the defendants, but afterward, on review, one of them was acquitted, it was held that he was entitled to costs of travel and attendance for himself and all the witnesses used in the defense, both on the first trial and review.³ *

¹ *Livingston v. Bishop*, 1 Johns. 290.

² *Canfield v. Gaylord*, 12 Wend. 236; *The Albany & West Stockbridge R. R. Co. v. Cady*, 6 Hill, 265; *Decker agst. Gardiner*, 8 N. Y. R. 29; N. Y. Code, § 305; *post*, § 288.

³ *Durgin v. Leighton*, 10 Mass. 56.

* In New Hampshire, the act of July 2d, 1838, changed the law to some extent respecting costs in actions of review, by providing that, in the event of a reduction of the damages, on review brought by the defendant in the original action, he should recover of the original plaintiff only so much cost as should equal the amount of the reduction of the former verdict. Formerly, in that State, if upon review the damages were reduced at all, although merely nominally, the whole burden of the costs of the action of review was thrown upon the original plaintiff. Such was the law upon the language and legal interpretation of the statutes then in force. Palpable injustice was seen to result from the operation of those statutes, not foreseen or intended by the Legislature. The rule above stated was adopted for the prevention of such results, and as a means of carrying out the real and manifest design of the statutes upon this subject. By the rule, if, upon the evidence before them, the jury should find the sum due to the original plaintiff to be substantially less than the original verdict, they were bound to return a verdict for such lesser sum. It was only in case of a merely nominal and unsubstantial difference of opinion that the jury, upon the review, were entitled to enlarge their verdict by adopting that returned on the original trial. The effect of the rule was to cast the expenses of the litigation upon the party reviewing in those cases in which substantial justice had been done by the former verdict. In that way exact justice was effected. No provision of law was violated or disregarded—the expenses of the review were awarded only to a

22. *Verdict.*

§ 122. Technical nicety is not required in the verdict. A general finding of guilty and judgment "according to the verdict" is sufficient.¹ And a verdict that the jury "do not think or believe the defendant guilty" will entitle him to judgment.² In New Jersey, where, in trespass, the jury on a special issue found a general verdict of guilty, it was held that the court would adapt the verdict to the issue, and that the amendment might be made by the court in banc, without the *postea* being amended by the circuit judge.³ Where there was a new assignment, and a general verdict was found with entire damages, the English Court of Exchequer applied the damages to the issue on the new assignment.⁴ * That the verdict is in the alternative will not be a ground for arrest of judgment.⁵ If there be two counts, one under a statute, and the other at common law, and a general verdict, the finding will be presumed to be for single damages only.⁶

§ 123. When the action is against several, the jury, in rendering their verdict, have no right to discriminate as to the enormity of the acts of each.⁷ To a count for an expul-

party whose rights had been substantially prejudiced by the former finding; while the party moving a review, whose motive, to be inferred from the result, might well be supposed to have been none other than the love of litigation, or the worse one of harassing his antagonist, was compelled to bear the whole burden of the litigation, as he properly and justly should. Upon a retrial of an action of trespass, upon a writ of review, it was held that the jury were correctly instructed that if they found the just sum of damages due to the original plaintiff, upon the proofs and the law before them, to be less than the sum of the former verdict, and the difference between the sum thus found and the former verdict was merely trifling and inconsiderable, it was competent for them to return a verdict for the precise amount of the former one (*Carpenter v. Pierce*, 13 N. Hamp. 403).

¹ *Powers v. David*, 6 Ala. 9.

² *Phillips v. Kent*, 3 Zab. 155.

³ *Johnson v. Packer*, 1 N. & M. 1.

⁷ *Carney v. Reed*, 11 Ind. 417.

² *Pollard v. Otter*, 4 Dana, 516.

⁴ *Webb v. Allen*, 1 Anst. 261.

⁶ *Cooper v. Maupin*, 6 Mo. 624.

* Where the declaration alleged that all of the defendants committed the trespass, to which the defendants all pleaded the general issue, and separate pleas of justification, and the verdict was as follows: "We, the jury, find the defendants guilty as the plaintiff in declaring has alleged, and assess the damages sustained by the plaintiff to three hundred and fifty dollars." It was held that the verdict was bad in not covering the issues (*Hanly v. Levin*, 5 Ohio, 227).

sion, A. pleaded not guilty, and B. and C. paid twenty shillings into court, and pleaded that the plaintiff had sustained no greater damages. The jury wished to find a verdict for the plaintiff against A. for twenty shillings beyond the sum paid into court, and a verdict that twenty shillings as to B. and C. was sufficient. It was held that this could not be done; that if the jury thought that A. was guilty, and that the damages the plaintiff had sustained exceeded twenty shillings, they should find a verdict against all the defendants for so much as the plaintiff's damages exceeded that sum.¹ *

§ 124. The rule in *assumpsit*, that if one defendant is not found liable, the verdict will be in favor of all the defendants, does not hold in *trespass*; ² and if, in an action of *trespass* against several, some are acquitted and others found guilty, setting aside the verdict as to the latter, will not avoid it as to the former.³ Where in an action against four, the case was left with the jury as to all the defendants, a verdict against three assessing the damages was sustained, though it did not find the fourth not guilty.⁴ It is for the jury to determine whether there was a joint or only a single *trespass*; ⁵ and a general verdict against all will be tantamount to finding against all.⁶

¹ *Walker v. Woolcott*, 8 Car. & P. 352.

² *Gillerson v. Small*, 45 Maine, 17.

³ *Brown v. Burrus*, 8 Mo. 26.

⁴ *Wilderman v. Sandusky*, 15 Ill. 59.

⁵ *Owens v. Derby*, 2 Scam. 26.

⁶ *Sutliff v. Gilbert*, 8 Ham. 405.

* In an action of *trespass*, if the facts stated in the declaration are established under the general issue, the plaintiff is entitled to a verdict, even though the declaration might be bad on demurrer (*Allen v. Parkhurst*, 10 Vt. 557).

If a declaration in *trespass* contain two counts, and the defendant plead to one, and suffer judgment by default on another, and, on trial of the first, the plaintiff establishes one act of *trespass* which is covered by the second count, he is not entitled to a verdict on the first count (see *Compere v. Hicks*, 7 T. R. 727).

In an action of *trespass* against a number of defendants, who severally pleaded not guilty, the jury found a verdict for the plaintiff, omitting to mention two of the defendants. On motion, the verdict was set aside as not conforming to the issue (*Kilbourn v. Waterous*, Kirby, 424).

In *trespass* against several defendants, and a justification, if a verdict is taken against all on the plea of not guilty, and the period during which a joint *trespass* is proved is covered by the justification, the defendants are entitled to a verdict (*Feltham v. Cartwright*, 3 Jur. 606).

§ 125. The application to a judge in the course of a cause to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated not merely by the fact, that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities, whether any such will arise before the whole evidence in the cause closes.¹ But it will be error in the court to instruct the jury, on the motion of the plaintiff, to acquit one of several defendants.²

§ 126. That the judge asked the jury the ground of their verdict, is not matter of exception. It is within his discretion to inquire of them upon what facts their verdict is based, for the purpose of correctly stating the questions of law, if any should arise in the case; or in order to terminate the case, if the particular facts found are conclusive as to the matters in issue between the parties.³

§ 127. When the jury come to the bar to deliver their verdict, all or any of them have a right to dissent from a verdict to which they had previously agreed; and they may change their mind and disagree to their verdict after they have pronounced it in open court, before it is received and entered on the minutes.⁴

§ 128. It is the absolute right of a party to have the jury polled on their bringing in their verdict, whether it be sealed or oral, unless waived by him.* The object of polling a jury is to ascertain if the verdict which has just been presented or announced by their foreman, is their verdict, or in other words, if they still agree to it; not to ask them what their verdict means, nor to question them as to their intention in finding it. The clerk, as he calls over the list of jurors, asks

¹ Sowell v. Champion, 2 Nev. & P. 627; 6 Ad. & E. 407.

² Gearheart v. Smallwood, 5 Mo. 452.

³ Spoor v. Spooner, 12 Metc. 281.

⁴ Root v. Sherwood, 6 Johns. 68.

* The expression in Blackley v. Sheldon, 7 Johns. 32, "if the court please," would seem to imply that the polling of the jury was in the discretion of the court. But in Fox v. Smith, 3 Cowen, 23, and Jackson *ex dem.* Fink v. Hawks, 2 Wend. 619, it was held otherwise.

them one by one, or by the poll, the question, "Is this your verdict?" This question requires but one answer, and still embraces all the legitimate objects of polling a jury. The party has no right to dictate the manner in which a jury shall be polled, or to insist on any other question being put to them than the simple one to ascertain whether they agree to the verdict as presented.¹*

23. *Amendment after verdict.*

§ 129. The reasonable rule in relation to amendments after verdict is, that where the verdict is for a sum larger than the *ad damnum*, the difficulty may always be remedied by entering a remittitur for the excess; that the *ad damnum* may be amended after verdict when it is apparent from the declaration itself that it was left blank, or too small a sum inserted, through mistake, or inadvertence only; that if there has been a full and fair trial on the merits appearing on the face of the declaration, without any knowledge by either party of the defect, judgment may be rendered without a new trial; but that if it does not appear that the defendant had no knowledge of the defect, the amendment may be made, but a new trial must be granted to give him an opportunity to contest the enlarged demand. That in actions sounding in damages only, where the plaintiff deliberately estimates the injury to himself, and there is only a difference in judgment between the jury and himself as to the nature, extent, and aggravation of the injury, no amendment increas-

¹ *Labar v. Koplin*, 4 N. Y. 547.

* In this case, which was an action for assault and battery against two, on the return of the jury with a general verdict for the plaintiff against both defendants, the counsel for the defendants requested the judge that the jury might be polled by asking them if that was their verdict "*against each*" and both defendants, which the judge refused to permit; and it was held by the New York Court of Appeals that such refusal was proper. Mullett, J., in delivering the opinion of the court, said: "In the case under consideration, the verdict announced was clearly against both defendants, and the question proposed to be put to the jury was not only unusual, but seemed to require an explanation of the verdict. It was in substance asking them whether they intended or designed the verdict to be against each and both of the defendants. Such a departure from the established practice can produce no good result, and may lead to much evil."

ing the *ad damnum* to cover the verdict will be allowed, and the only remedy for an excessive verdict is a *remittitur*; yet that the court, in their discretion, may allow the *ad damnum* to be increased in any case where after a full and fair trial upon the merits, the defendant claims and insists upon an appeal or review.¹ *

24. Judgment.

§ 130. The judgment cannot be rendered for any more trespasses than are laid in the declaration.² If there be several issues on not guilty and justifications which do not cover the whole declaration, and a verdict is found for the plaintiff on the first, and for the defendant on the last, the judgment must be for the plaintiff.³

§ 131. If the jury assess the damages against one defendant at a certain sum and against another at a greater sum, the plaintiff may discontinue as to one defendant, and take judgment against the other, each defendant being separately liable for the whole.⁴ But where in an action of trespass against several there is but a single plea, and joint damages are found, there must be a joint judgment; if the jury give separate damages, the plaintiff will be entitled to judgment against all for the largest amount of damages found against any one; and if the verdict be set aside as to some, no judgment can be rendered against the rest.⁵

§ 132. If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it is irregular; and if the plaintiff enter up final judgment with

¹ Taylor v. Jones, 42 N. Hamp. 25.

² Gillen v. Wilson, 2 Monr. 11.

³ Knight v. Lillo, 2 Wils. 81.

⁴ Turner v. McCarthy, 4 E. D. Smith, 247.

⁵ Cunningham v. Dyer, 2 Monr. 50; Sabin v. Long, 1 Wils. 30; Pryce v. Foulkes, 4 Burr. 2418; Halsey v. Woodruff, 9 Pick. 555; Beal agst. Finch, 11 N. Y. 128.

* Where the defendant, justified in trespass under a custom which could not be supported, and it was found for him, the court set aside a verdict rendered in his behalf on that issue, and entered a verdict for the plaintiff with nominal damages (Selby v. Robinson, 2 T. R. 758).

those several damages against the defendants, it is erroneous. But the court will permit the plaintiff to set aside his own proceedings before final judgment, on payment of costs.¹

§ 133. Where upon a motion by the defendant for a new trial it appears that since the term of the court in which the verdict was rendered the defendant has died, the rule for the motion having been discharged, judgment may be entered for the plaintiff, as of the term in which the verdict was had.²

§ 134. The want of jurisdiction in a court rendering a judgment may be shown collaterally whenever any benefit or protection is sought under the judgment, such want of jurisdiction making the judgment *coram non judice* and void.³ But it is a rule to which there is no exception, that when a judgment is rendered by a court or judge having jurisdiction of the subject-matter, its regularity cannot be inquired into in a collateral proceeding; and this rule applies to judgments of justices of the peace.⁴*

25. *Writ of error.*

§ 135. An erroneous proceeding is valid until reversed on error; and, notwithstanding such reversal, it is regarded as having been valid. It still remains a record though reversed. It may be pleaded as such, and constitutes a justifi-

¹ Mitchell v. Milbank, 6 Term R. 199.

² 2 Tidd's Pr. 846; Tooker v. Duke of Beaufort, 1 Burr. 146; Trelawney v. Bishop of Winchester, 1 Burr. 219; Toulmin v. Anderson, 1 Taunt. 385; Mackay v. Rhinelander, 1 Johns. Cas. 408; Ryghtmyre v. Durham, 12 Wend. 245; Collins v. Prentice, 15 Conn. 423.

³ Bigelow v. Stearns, 19 Johns. 39; Elliott v. Peirsol, 1 Peters, 340; Putnam v. Man, 3 Wend. 202.

⁴ Billings v. Russell, 23 Penn. St. R. 189.

* Where an action of trespass was brought before a justice of the peace against several, one of whom was not served with process, and judgment rendered against those who had been summoned, and upon appeal to the Circuit Court judgment was rendered not only against them, but also against the defendant not summoned, it was held that as to him the judgment was a nullity (Prichard v. Campbell, 5 Ind. 494).

Where, on a writ of error on a judgment for the plaintiff, in an action of trespass, the judgment was affirmed, the court declined to allow interest on the judgment, stating that where the cause of action was a tort it was not customary to allow interest (Gelston v. Hoyt, 13 Johns. 561).

cation for all things done under its authority previous to the reversal.¹ An erroneous instruction may be revised upon exceptions, although not specifically objected to before verdict, when the instruction obviously extends to the whole grounds of defense, and is not of such a casual or incidental nature that the defendant was in fault for not calling attention to its inaccuracy before.² A judgment against several may be reversed as to one or more of the defendants, and affirmed as to the others.³

26. *New trial.*

§ 136. Where improper evidence is admitted, notwithstanding it is objected to, and the evidence is not noticed by counsel on either side in addressing the jury, or by the court in instructing them, as the jury have the right to regard it as legal and material, and it is impossible to know that it had no effect upon their verdict, its admission is ground for a new trial.⁴ But where evidence is given solely to prove a fact which, upon examination, is found not to be material, and it has no tendency to influence the minds of the jury upon other points, the verdict ought not to be set aside, though such evidence was not legally competent.⁵ *

¹ *Blanchard v. Goss*, 2 N. Hamp. 493; *Gorrill v. Whittier*, 3 Ib. 265; *Smith v. Knowlton*, 11 Ib. 191; *Morse v. Presby*, 25 Ib. 303; *Gay v. Smith*, 38 Ib. 171.

² *Esty v. Wilmot*, 15 Gray, 168.

³ *Van Slyck v. Snell*, 6 Lansing, 299. But see *Whitmore v. Delano*, 6 N. Hamp. 543, and *Farrell v. Calkins*, 10 Barb. 348.

⁴ *Brown v. Cummings*, 7 Allen, 507.

⁵ *Buddington v. Shearer*, 22 Pick. 427.

* Where, in an action of trespass against two, one is acquitted and the other found guilty, a new trial will not be granted, in order that the one convicted may have the other as a witness (*Sawyer v. Merrill*, 10 Pick. 16). By the court: "On general principles, we doubt whether, as a matter of policy and convenience, an application like this ought be granted. The petitioner would put it on the ground of newly discovered evidence, but that is incorrect. It is the case of an incompetent witness having become competent. To grant the petition would be to make every case of a witness' becoming competent, a ground for a new trial. But a decisive reason against granting this application is, that, upon a new trial, the petitioner could not avail himself of the testimony in question. If the verdict is set aside, the case must come to trial just as it did before against both of the defendants, and Bryant would be put on his trial again, after having been acquitted."

In *Leroux's case*, cited 6 T. R. 625, 626, where in an action of trespass against

§ 137. A verdict for the defendant, though contrary to evidence, will not be set aside if the plaintiff was only entitled to nominal damages.¹ In *Burton v. Thompson*,² in which a new trial was denied, although it was admitted that the verdict was in direct opposition to the proof, Lord Mansfield remarked that it did not follow, by necessary consequence, that there must be a new trial granted in all cases whatever, where the verdict was contrary to evidence, where there was no real damage and the injury trivial. And, in *Cady v. Fairchild*,³ which was a case similar in its nature, and presenting the same question, the Supreme Court of New York said: "This is strictly a verdict contrary to evidence, but as no more than nominal damages ought to have been given, no material injustice has been done; and we ought to apply the rule which has been settled in regard to new trials."

§ 138. In actions of tort, the damages must be excessive and outrageous to warrant a new trial on that ground. Where printer's boys, who had been unlawfully imprisoned for six hours, brought their several actions, and the jury gave each of them 300*l.* damages, the court refused to disturb the verdict, although it was proved that each of the plaintiffs had been generously fed during their imprisonment. Pratt, C. J., forcibly expressed the principle governing this and similar cases thus: "If the jury had been confined by their oath to consider the mere personal injury only, perhaps 20*l.* damages would have been thought sufficient. But the small injury done to the plaintiffs, or the inconsiderableness of their station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject did."⁴

three, two were acquitted and one convicted, a new trial was granted, but it was done with the consent of those who were acquitted.

¹ *Stephens v. Wider*, 32 N. Y. R. 351.

² 2 Burr. 664.

³ 18 Johns. 129.

⁴ *Huckle v. Money*, 2 Wils. 205; *Williams v. Currie*, 1 C. B. 848; *Fabrigas v. Mostyn*, 2 W. Bl. 929; *Allen v. Craig*, 1 Green, 294.

§ 139. Before the court can set a verdict aside merely for excess of damages, it ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. When the damages depend in any wise upon calculation, the court have some criterion by which it is enabled to correct any mistake of the jury. But where the court has no such light to guide it, the damages depending upon mere sentiment and opinion, it would be very dangerous for it to interfere.¹ "I should be sorry to say," remarked Lord Mansfield, "that in cases of personal torts, no new trial should ever be granted for damages which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury. I always have felt that it is extremely difficult to interfere, and say when damages are too large. You may take twenty juries, and every one of them will differ from 2,000*l.* down to 200*l.* Nevertheless, it is now well acknowledged in all the courts of Westminster Hall, that if the damages clearly are too large, the courts will send the inquiry to another jury. Where they interfere, they always go into all the circumstances, put themselves in the situation of the plaintiff and defendant, and examine closely into all their conduct."²

§ 140. Where it appears that a person against whom excessive damages have been recovered, acted in the discharge of some duty, or in the *bona fide* exercise of some power or authority which he supposed he possessed, and meant to act right, but, by mistake, did wrong, a new trial will be granted.³ So, on the other hand, a new trial will be granted where the plaintiff does not come into court with clean hands, and the circumstance has been overlooked by the jury, and excessive damages have been given.⁴ A judg-

¹ Duberley v. Gunning, 4 Term R. 651.

² Gilbert v. Bartenshaw, Cowp. 230; Lofft, 771; Britton v. South Wales R. R. Co. 27 L. J. Exch. 355.

³ Eliot v. Allen, 10 C. B. 18.

⁴ Duberley v. Gunning, *supra*.

ment based on the allowance of interest on the damages assessed by the jury, will be corrected by the appellate court as a clerical error.¹

§ 141. Although a new trial will sometimes be granted in actions *ex delicto* for smallness of damages, yet this will not be done when there is no standard for estimating the damages, and the court are not able to lay down any rule for the guidance of the jury.²

¹ Jean v. Sandiford, 39 Ala. 317.

² Stafford's Case, cited 4 Term R. 655.

BOOK II.

TRESPASS TO THE PERSON.

CHAPTER I.

ASSAULT AND BATTERY.

1. Meaning of assault.
2. Battery defined.
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4. Self-defense.
5. Defense of property.
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7. Right of owner or occupier of premises to eject persons therefrom.
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41. Damages from wounded feelings.
42. Malicious intent as affecting the damages.
43. Damages for assault upon child or servant.

- 44. Damages after conviction for public offense.
- 45. Damages accruing after commencement of action.
- 46. Inadequate or excessive damages.
- 47. Costs.
- 48. Verdict.

1. *Meaning of assault.*

§ 142. An assault is an attempt or offer, against the will of another, to commit some bodily harm, accompanied by an act which, if not arrested, will result in personal injury.¹ * Where a policeman prevented a member of a society from entering the society's room, it was held that, if the policeman was wholly passive, and merely obstructed the entrance, as any inanimate object would, it was not an assault.² The offense may, however, be committed against a person who is not seen or known to be present. As if one were wantonly to fire a loaded gun, and the ball should pass through a house where people were, it might be an assault on all of them. But proof that A. entered a house with force, having a right to the immediate possession, and removed the windows of a room in which B. was sick in bed, without evidence that A. knew that B. was in the house, will not support an allegation that A. broke and entered the house and committed an assault on B. therein.³ †

¹ Com. Dig. Battery, C; Bac. Abr. Assault and Battery, A; 1 East's P. C. 406; 3 Blk. Com. 120, n. 3; Christopherson v. Bare, 11 Q. B. 473; Reg. v. Martin, 9 C. & P. 215; R. v. Johnson, 34 L. J. M. C. 192; State v. Malcom, 8 Clarke, Iowa, 413; Com. v. Ruggles, 6 Allen, 588.

² Innes v. Wylie, 1 Car. & K. 257.

³ Meader v. Stone, 7 Metc. 147.

* An important object to be attained by the enactment of laws and the institution of civilized society, is security against unlawful assaults. Without such security, society loses most of its value. Peace, order and domestic happiness, more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain.

The Revised Statutes of Maine define an assault and battery thus: "Whoever unlawfully attempts to strike, hit, touch or do any violence to another, however small, in a wanton, wilful, angry or insulting manner, having an intention and existing ability to do some violence to such person, shall be deemed guilty of an assault; and if such intent is carried into effect, he shall be deemed guilty of an assault and battery" (ch. 118, § 28).

† In an action by a husband and wife for an assault on the wife, the following evidence was held insufficient to sustain the charge: That the defendant, having bought the premises occupied by the plaintiffs, and terminated the tenancy, peaceably entered and requested the plaintiffs to leave and remove their furniture,

§ 143. The following have been held to constitute an assault: Raising the fist in a threatening manner;¹ riding a horse so near another as to endanger him, and create the belief in his mind that it is the intention of the person on the horse to ride over, or to beat him;² ordering the plaintiff to leave the defendant's shop, and, upon his refusal, sending for some men who gather around the plaintiff, tuck up their sleeves and aprons, and threaten to break his neck, if he does not leave;³ the advancing of A., in a threatening attitude, with an intention to strike B., so that his blow would have reached B. if he had not been stopped, although, at the particular moment when A. was stopped, he was not near enough for his blow to have taken effect;⁴ holding a gun in a manner indicating an intention, coupled with the ability, to shoot another;⁵ but not holding a cocked pistol by one's side, without any attempt to use it, and saying, "I am now ready for you;"⁶ nor when a gun is not held as if about to be fired, and without an intention to fire, although pointed in the direction of the other, and within shooting distance.⁷ In an action for an assault, the declaration stated that the defendant assaulted the plaintiff, "and also then presented a certain pistol, loaded with gunpowder, ball and shot, at the plaintiff, and threatened and offered therewith to shoot the plaintiff and blow out his brains." It appeared that the parties, being on board a ship, the defendant (who was the captain) went into his cabin and brought out a pistol, and cocked it, and presented it at the plaintiff's head, saying that, if the plaintiff was not quiet, he would blow his brains out. It was held

which they refused to do; that he then broke open an inner door, which she fastened and refused to open, took off the doors and windows on a bleak winter's day, took a bloodhound into the house, made a great disturbance on the premises for several days, and would not allow any food to be taken into the house (*Stearns v. Sampson*, 59 Maine, 568).

¹ *Murray v. Boyne*, 42 Mo. 472.

² *The State v. Sims*, 3 Strobb. 137; *Martin v. Shoppe*, 3 Car. & P. 373.

³ *Read v. Coker*, 22 L. J. C. P. 201; 17 Jur. 990.

⁴ *Stephen v. Myers*, 4 Car. & P. 349; *State v. Vannoy*, 65 N. C. 532.

⁵ *Higginbotham v. State*, 23 Texas, 574. ⁶ *Warren v. State*, 33 Texas, 517.

⁷ *Woodruff v. Woodruff*, 22 Geo. 237; *Farver v. State*, 43 Ala. 354.

that, if the defendant, when he presented the pistol, used words showing that it was not his intention to shoot the plaintiff, this would not constitute an assault; and that it was incumbent on the plaintiff to substantiate the averment in the declaration that the pistol was loaded with gunpowder, ball and shot; and that, unless the jury were satisfied that the pistol was loaded, they ought to find for the defendant.¹

§ 144. The last mentioned case can scarcely be deemed a safe or reasonable precedent. The court, doubtless, yielded something to the circumstance that the transaction occurred on ship board, where much latitude of conduct on the part of the officers is allowed for the preservation of necessary discipline.* It has been held that, if a person presents an unloaded pistol at another, threatens to shoot, and finally lowers the pistol, it is an assault; and that the fact that it was not loaded will not excuse him, without also proving that the other person knew that it was not loaded.² In *Beach v. Hancock*,³ it appeared that the plaintiff and defendant, being engaged in a quarrel, the defendant stepped aside and procured a gun, which he aimed at the plaintiff, in an excited and threatening manner. There was proof that the defendant snapped the gun twice at the plaintiff; that the plaintiff did not know whether the gun was loaded or not; and that the gun was not loaded. The following instruction, given in the court below, was held correct: That "the pointing of a gun, in an angry and threatening manner," at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded; and that, whether or not the gun was snapped, made no difference. Where several persons followed another with a gun, and, by threats and insults, put him in bodily fear, it was held that they were guilty of an assault

¹ *Blake v. Barnard*, 9 Car. & P. 626. See *post*, § 204.

² *State v. Cherry*, 11 Ired. 475.

³ 7 Fost. 223.

* In *Blake v. Barnard*, *supra*, the plaintiff who was a seaman, had been guilty of noisy and mutinous conduct. Instructing the jury to decide what is an assault, is error (*Handy v. Johnson*, 5 Md. 450).

upon him, although they did not approach him nearer than seventy-five yards, and did not point the gun at him.¹

§ 145. Abusive language alone, cannot constitute an assault. But threatening words accompanied by an advance in a threatening attitude may do so.² And on the other hand, words sometimes serve to explain a person's intent so as to prevent what would otherwise be deemed an assault from amounting to such an offense; as where a man partly drew a sword from its scabbard, and in a threatening posture said, "if it were not that it is assize time, I would run you through the body;" this was held not to be an assault, the words explaining that the party did not mean any immediate injury.^{3 *}

2. *Battery defined.*

§ 146. A battery is the wilful or careless touching the person of another by the aggressor, or by some substance put in motion by him.⁴ Every such touching is actionable, unless it can be justified on the ground of self-defense, or in defense of one's property, or in obedience to some legal warrant of authority, or as the result of inevitable accident.⁵

§ 147. Placing the open hand upon another's breast, and pushing him back, constitutes a battery.⁶ Where a person,

¹ State v. Rawles, 65 N. C. 334.

² Keyes v. Devlin, 3 E. D. Smith, 518; Shorter v. The People, 2 Comst. 193; Stephen v. Myers, 4 C. & P. 349; *ante*, § 3; *post*, § 259.

³ 3 Bul. N. P. 15; Vin. Abr. Trespass, A; 3 Blk. Com. 120; *n.* 3; Bac. Abr. Assault & Battery, B; 1 East's P. C. 406; Com. v. Ruggles, 6 Allen, 588.

⁴ Ibid.

⁵ Griffin v. Coleman, 28 L. J. Exch. 134; 4 H. & N. 265; Wright v. Court, 4 B. & C. 596.

⁶ State v. Baker, 65 N. C. 322.

* A criminal conviction for an assault, cannot be upheld where no battery has been committed, and none attempted, intended, or threatened, by the party accused: It is indispensable to the offense that violence to the person be either offered, menaced or designed (The People v. Bransby, 32 N. Y. R. 525, per Porter, J., citing, Rosinski's Case, 1 Moody's Cr. Cas. 19; Nichol's Case, Russell & Ryan, 130; Regina v. Case, 1 Eng. L. & Eq. R. 544; Jackson's Case, Russ. & Ry. 487; Saunder's Case, 8 C. & P. 265; Bank's Case, 34 Eng. Com. L. 531; Meredith's Case, 34 Eng. Com. L. 539; Martin's Case, 38 Eng. Com. L. 85; The Queen v. Read, 13 London Jurist, 68; The People v. Hays, 1 Hill, 351).

on a charge of larceny, was taken outside of the town by those having charge of him, and one of them, putting his hand upon the person's shoulder, and, showing him a rope, told him he must confess the larceny, it was held that they were guilty of an aggravated trespass.¹ It is a battery for an officer to handcuff a prisoner previous to his conviction, when there is no attempt to escape, nor any reasonable ground to fear a rescue;² or for parish officers to cut off the hair of a pauper in the poorhouse by force, and against the will of such pauper.³ Again, if one, in trying to pass through a crowd, rudely and violently push against another, it will constitute a battery.⁴ So, likewise, if one of two persons who are fighting, unintentionally strike a third, the absence of intention can only be urged in mitigation of damages,⁵ unless such third person brought the injury upon himself by officiously and improperly intruding himself in the way of danger.⁶ The same may be said where a person drives against and violently upsets another in his carriage, or knocks him down, or overturns the chair in which he is seated, although he did not intend to do so.⁷ And the offense may be committed even with consent: as where two persons fight by agreement, although the injured party said he would exonerate the other;⁸ or where the resistance of a female to sexual intercourse is overcome by brutal violence, and her consent thereto is finally obtained.⁹ * But if one clap another on the back by way of joke, or in friendship, or touch him to call his attention to something, it is not a battery, unless done in a hostile or insulting manner.¹⁰

§ 148. Where the law has given an authority, it will pro-

¹ Stallings v. Owens, 51 Ill. 92.

² Forde v. Skinner, 4 C. & P. 239.

³ Cole v. Turner, 6 Mod. 149.

⁴ James v. Campbell, 5 C. & P. 372.

⁵ Hopper v. Reeve, 7 Taunt. 698.

⁶ Cogdell v. Yett, 1 Cold. Tenn. 230.

⁷ Bell v. Hausley, 3 Jones, N. C. 131.

⁸ Stout v. Wren, 1 Hawks, 420; Adams v. Waggoner, 33 Ind. 531.

⁹ Dickey v. McDonnell, 41 Ill. 62.

¹⁰ Williams v. Jones, Hard. 301; Wiffin v. Kincard, 2 B. & P. N. R. 472; Coward v. Baddelley, 4 H. & N. 481; 28 L. J. Exch. 261.

* But in such case, the sexual intercourse should not be taken into consideration, in estimating the damages (Dickey v. McDonnell, *supra*).

tect persons from the abuse of the authority, by leaving the one guilty of the abuse in the same situation as though he had acted without any authority. In Ward's Case¹ it was held that a constable who had a warrant of a justice of the peace to search the house of J. S. for stolen goods, and who pulled down the sheet of a bed in which there was a woman, and attempted to search under her night clothes, by this indecent abuse of his authority became liable as a trespasser.

3. *When accident will excuse.*

§ 149. Having heretofore² defined the term accident, as it is employed in the law, but little need be said on the subject here. We may, however, be permitted to repeat that to constitute an accident or casualty, or as the law sometimes terms it, an inevitable accident, it must have been such an occurrence as the defendant could not have avoided by the kind and degree of care which a prudent and cautious man would have used under the circumstances. A person who should have occasion to discharge a gun on an open and extensive plain, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town or city. If a horse, suddenly frightened by a flash of lightning, runs away with his rider, and the latter loses all power and control over the animal, and is unable to guide him, the injuries inflicted by the ungovernable horse, under such circumstances, are not injuries done by the rider, and the latter is, in substance, not guilty of committing them.³

§ 150. If the act of hitting the plaintiff was unintentional on the part of the defendant, and done in the performance of a lawful act, the defendant will not be responsible unless it was done through the want of the exercise of due care adapted to the exigency of the case. Where in an action for assault and battery, it appeared that the two dogs of the

¹ 4 Clayton, 44.

² *Ante*, §§ 5, 6, 7.

³ Gibbons v. Pepper, 2 Salk. 637; 1 Ld. Raym. 38; 4 Mod. 405.

parties were fighting, and that the defendant, in trying to separate them, accidentally hit the plaintiff in the eye, inflicting a severe wound, which was the offense charged; the case involved the inquiry how far, and under what qualifications, the party by whose unconscious act the damage was done was responsible for it. It was held that if both plaintiff and defendant, at the time of the blow, were using ordinary care, or if, at that time, the defendant was using ordinary care and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, the plaintiff could not recover.^{1*} *Castle v. Duryea*,² was an action of trespass against the colonel of a regiment of militia, who, in the course of the evolutions of his regiment at a military encampment, caused his men to face toward spectators some 350 feet distant, and then gave the order to *fire*; whereupon the guns, supposed to be loaded only with blank cartridges, were discharged, and the plaintiff and her infant in her arms, were wounded by a musket ball, the former seriously, the latter fatally. The following instruction of the judge was held correct: "That the defendant was not responsible for the injury complained of, if he exercised the prudent care and diligence demanded by the circumstances; and that he was not responsible for the negligence of those under his command, unless he made himself a party to the negligence by giving an improper order, or by neglecting some precaution which prudence required him to adopt. That the de-

¹ *Brown v. Kendall*, 6 Cush. 292.

² 32 Barb. 480; *aff'd* 2 Keyes, 169.

* In *Brown v. Kendall*, *supra*, the court said: "We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in the eye and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute, as an efficient cause, to produce it" (citing 2 Greenl. Ev. §§ 85 to 92; *Wakeman v. Robinson*, 1 Bing. 213; *Powers v. Russell*, 13 Pick. 69, 76; *Tourtellot v. Rosebrook*, 11 Metc. 460).

gree of care required to avoid an injury was in proportion to the seriousness and magnitude of the consequences which would probably ensue from the want of it. That gunpowder and firearms were powerful agents, and it was proper for the jury to consider whether the person using them under the circumstances detailed in the evidence, was not bound to exercise a high degree of care and diligence to prevent injury. A verdict was rendered in favor of the plaintiff for \$1,500, and the appellate court declined to disturb it.

§ 151. The burden of proof in cases of apparent accident is on the plaintiff to show either that the intention was unlawful or that the defendant was in fault. Where, therefore, A. threw a stick which struck the plaintiff, but it did not appear for what purpose the stick was thrown, it was held that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident.¹

4. *Self-defense.*

§ 152. Self-defense has been justly characterized as the primary law of nature, and is held to excuse not only breaches of the peace, but even homicide.* But the resist-

¹ Alderson v. Waistell, 1 Car. & K. 358.

* In *State v. Hooker*, 17 Vt. 658, which was an indictment for an assault and battery upon a sheriff, it appeared that the sheriff went to the respondent's house with legal process for the purpose of serving it upon him, and found the outer door fastened, and that not succeeding in having the door opened, he effected an entrance by bursting off the latch. At the trial the judge instructed the jury that the sheriff had no right to break open the outer door, and that for so doing he was a trespasser; but that if, after he had entered the house, he proceeded to arrest the respondent, the latter had no right to resist him. The Supreme Court, in granting a new trial for misdirection, said: "It is a familiar maxim of the law, that 'a man's house is his castle,' and that he has a right to defend it. How far he may carry his defense, and within what bounds it must be restrained, is the subject of inquiry. A man has a right to defend himself against an unlawful aggression to an extent that shall make his defense effective, without regard to consequences. Chitty, in his treatise upon criminal law, lays down the doctrine in its broadest sense, that the breaking the outer door of a dwelling-house upon civil process is unjustifiable. The inquiry, therefore, is whether, having thus done what is unjustifiable, the sheriff may, by the means and aid of this unjustifiable act, proceed to do a lawful act. The officer, when he restrains the debtor of his liberty, justifies the act by the authority of the law, not by any natural right of his own to do so. It then presents this strange anomaly, that an officer who has no authority except what is delegated to him by the law for

ance to be lawful must not exceed the bounds of mere defense and prevention; and the force employed must be appropriate in kind as well as suitable in degree.¹ In an action for trespass on land, and for assault, battery and wounding, the defendants pleaded that the public had a prescriptive right to navigate a stream; that the plaintiff obstructed it;

a specified purpose, can justify an attempt to restrain the liberty of another, when his purpose is aided and accomplished by an unjustifiable act, and a breach of the very law under which he assumes to act. Mr. Chitty makes a distinction between the killing of an officer thus breaking the outer door, and one not an officer. But what shall be the effect of any resistance short of killing, he does not say. There are instances in which an officer may be resisted, which he enumerates, and they are—1. When the warrant is defective; 2. When it is not enforced by a proper officer; 3. When it is executed out of the jurisdiction; 4. When the wrong person is taken under it. So that by this authority it seems that the person of the officer is not so sacred that all other rights must yield and be postponed to his. It would by this seem, therefore, that in order to throw the shield of the law over an officer so as to make it criminal for another to resist him in what he is attempting to do, certain requisites are necessary. He must not only be a legal and proper officer, but he must have a good and sufficient precept which he is attempting to execute, and he must be attempting to execute it in a legal way. After the respondent had made the resistance for which he is indicted, he was arrested by the officer. Now, suppose the respondent had instituted proceedings to obtain a discharge from that arrest, what would have been the inquiry, and what ought to have been the judgment? Without answering the question which I have proposed, we can see what has been the inquiry in analogous cases. There are certain times and occasions on which persons are exempted from arrest on civil process, such as witnesses, parties, and jurors in attendance upon court, and members of Parliament, public ambassadors and their servants; and when such are arrested, and even committed on execution, they are discharged from custody; and in some cases it has been held that the court had the power to punish the officer for arresting them. When a man is wrongfully brought into a jurisdiction, and is there lawfully arrested, yet he ought to be discharged, for 'no lawful thing, founded on a wrongful act, can be supported' (per Lord Holt, in 11 Mod. 51). Where a person was detained without a writ, and afterwards, while thus detained, was arrested on a writ, he was discharged (2 H. Bl. 29). All these legal maxims have their correlatives. When A. unlawfully attempts to arrest B., B. may lawfully resist him. Whatever I may lawfully enjoy, I may lawfully defend. In the protection of my own rights, whatever it is unlawful for another to do, it is lawful for me to prevent him from doing. In the present case, then, if it was unlawful for the officer to break open the house in order to arrest the respondent, it was lawful for the respondent to prevent him from doing it. The breaking and arresting were dependent one upon the other, and are not to be disconnected. The breaking was for the purpose of arresting, and the arresting was consequent upon the breaking. It would therefore seem to follow that if one was unlawful, the other was equally so" (and see *Hooker v. Smith*, 19 Vt. 151).

¹ *Moriarty v. Brooks*, 6 C. & P. 684; *Reece v. Taylor*, 4 Nev. & Man. 470; 1 Har. & W. 15; *O'Leary v. Rowan*, 31 Mo. 117; *Scribner v. Beach*, 4 Denio, 448; *Elliott v. Brown*, 2 Wend. 497; *Gates v. Lounsbury*, 20 Johns. 427; *Gregory v. Hill*, 8 Term R. 299; *Baldwin v. Hayden*, 6 Conn. 453; *Curtis v. Carson*, 2 N. Hamp. 539; 3 Blk. Com. 3; 1 Hawk. P. C. 130; *State v. Davis*, 7 Jones, N. C. Law R. 52; *Shorter v. The People*, 2 N. Y. R. 193; *Rogers v. Waite*, 44 Maine R. 275; *Com. v. Clark*, 2 Metc. 23; *Greenl. Ev.* § 95.

that while trying to remove the obstruction, the plaintiff assaulted them, and they, in self-defense, necessarily beat and wounded him a little, employing only such force as was necessary to remove the obstruction. The plaintiff having demurred, it was held that the facts set forth in the plea were *prima facie* a justification of the wounding.¹ And where the plaintiff was lying in wait to execute threats of personal violence upon the defendant, and actually gave him a severe blow, it was held that the defendant might lawfully pursue and lay hold of him, as well to ascertain the assailant as to protect himself against further injury.² *

§ 153. If a person be attacked in such a way as to justify a reasonable belief that it is made with the design to take his life or inflict great bodily injury, he may lawfully kill, or attempt to kill his assailant, although it subsequently appear that he was mistaken; and the question of reasonable belief must be passed upon by the jury. In *Morris v. Platt*,³ it was proved that the defendant wounded the plaintiff in two places, by two shots fired from a pistol; and from the nature of the weapon, and other conceded circumstances, the wounds appeared to have been inflicted with a design to take the life of the plaintiff. The defendant offered to prove that he was attacked by the plaintiff and others, in a manner which indicated a design to take his life—that “he was in great bodily peril, and in danger of losing his life by means of the attack”—and that he fired the pistol to protect his life and save himself from extreme bodily injury. It was held, that if these facts were proved, the defendant was justified in the attempt to take the life of the plaintiff.⁴ †

¹ *Brubaker v. Paul*, 7 Dana, 428.

² *Paige v. Smith*, 13 Vt. 251.

³ 32 Conn. 75.

⁴ See *post*, § 164.

* A person is not called upon to flee to avoid an assault and battery before he is entitled to recover therefor (*Heady v. Wood*, 6 Ind. 82).

† In an action by C. against T. the following charge was held error:—“If the jury find that C. committed the first assault, yet that T. had used more force than was necessary to defend himself, and in so doing had shot C., when it was not necessary for him so to do to save himself from being harmed by C., then they must find for C. (*Taylor v. Clendening*, 4 Kansas, 524).”

§ 154. But the restraining the employment of force to what is necessary to protect the assailed from injury, is, of itself, enjoining upon the assailed to use no violence, if self-protection can be otherwise had. It is the very imminence of the danger of injury that justifies the counter assault; and it is therefore a necessary corollary that it is the duty of every citizen to endeavor to avoid the assault which another threatens. The proposition might be stated in stronger terms, viz.:—That an assault cannot be justified as made in self-defense, unless the danger of injury is so manifest and pressing that no other reasonable means of self-protection are immediately available. Human pride may sometimes be wounded by prescribing such a rule of conduct. But a love of peace, respect to good order in society, no less than the teachings of the highest code of morals, forbid that any should lay violent hands upon his neighbor without an endeavor to avoid his assault.¹ Where a woman asked a man on horseback why he had been talking about her, and threw a stone and stick at him, and he dismounted and hit her on the head with a stick, he was held guilty of assault and battery.² And where a person struck the horse of another on the head with his hand, causing the horse to step back three or four feet, it was held that this did not justify the owner of the horse in severely beating the other and knocking him down with the butt of his whip.^{3*}

§ 155. An act in necessary self-defense which injures an innocent bystander is justifiable. If, therefore, a lighted fire-

¹ Selw. N. P. 25; Keyes v. Devlin, 3 E. D. Smith, 518; Mitchell v. State, 41 Geo. 527; Chambers v. Porter, 5 Cold. Tenn. 273; Elliott v. Brown, 2 Wend. 497.

² The State v. Gibson, 10 Ired. 214.

³ Com. v. Ford, 5 Gray, 475.

* Cockroft, in a scuffle, ran his finger toward Smith's eye, who bit a joint off from Cockroft's finger. The question was, whether this was a proper defense for the defendant in an action for the mayhem. Holt, C. J., said, "That a man ought not, in the case of a small assault, to give a violent or unsuitable return, but in such a case plead what is necessary for a man's defense, and not who struck first; for hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other" (Cockroft v. Smith, 11 Mod. 43).

Whoever is guilty of a breach of the peace, or of doing unnecessary violence to the person of another, although it may be in the assertion of an unquestioned and undoubted right, is liable to be prosecuted therefor (Williams, Ch. J., in Hodgeden v. Hubbard, 18 Vt. 504).

work be thrown into a coach full of passengers, and flung out again in necessary self-defense, and falls against and burns a bystander, or explodes in his face and blinds him, the culpable party is he who threw the burning material into the coach, and the person who threw it out is not liable for the damage.¹ In the case previously noticed of the lighted squib,² which was thrown into a market house, it may be observed that the force which was given to it was spent when it fell upon the standing, and that it was afterward twice put in motion, and in different directions, before it struck the plaintiff and put out his eye. But as the throwing of the squib was a mischievous act which was likely to do harm to some one, and as the two men who gave the new impulses to the missile, acted from terror and in self-defense, they were held excused. In *Morris v. Platt*,³ which was an action for an assault in which the defendant pleaded that he acted in self-defense, the plaintiff in reply, denied that he was an assailant, and claimed that he was a bystander merely, and requested the court to charge the jury in substance, that if they so found, he was entitled to recover, although they should also find that the defendant was lawfully defending himself against his assailants, and that the injury to the plaintiff was accidental. The request of the plaintiff embodied the unqualified proposition that a man lawfully exercising the right of self-defense, is liable to third persons for any and all unintentional, accidental injurious consequences which may happen to them; and the court having so charged, it was held error.*

¹ De Grey, C. J., 5 Wils. 412.

² *Scott v. Shepherd*, 2 W. Blk. 892; *ante*, § 20.

³ 32 Conn. 75.

* In *Morris v. Platt*, *supra*, the court said:—"If the defendant had been in the act of firing a pistol at an assailant in lawful self-defense, and a flash of lightning had blinded him at the instant, and diverted his aim, or an earthquake had shaken him and produced the same result, or if his aim was perfect, but a sudden violent puff of wind had diverted it, or the ball after it passed from the pistol, and the ball by reason of the diversion, had hit the plaintiff, the accident would have been so effected, in part, by the uncontrollable and unexpected operations of nature, as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff. And in the second place, if while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant,

§ 156. Besides self-protection, the right also includes the defense of those who sustain the relations of husband and wife, parent and child, master and servant;¹ and a person may rightfully use reasonable force to protect a stranger from unlawful violence, and thus prevent a breach of the peace.² But the force employed in such case, will only be justifiable to the extent that it is necessary for the defense, and only where the person defended was first attacked and was resisting his assailant when the party interfered.³

§ 157. The question has sometimes arisen whether the party first attacked in a personal rencounter, is entitled to an action for assault and battery if he use so much personal violence toward the other party, exceeding the bounds of self-defense, as could not be justified under the plea of *son assault demesne*,* were he a party defendant in a suit. The negative was held in an early case in New York.⁴ The ground upon which the decision was placed was, that there could not be

so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot, hit the plaintiff, who till then was invisible, and his presence unknown to the defendant; or if the pistol was fired, in other respects, with all the care which the exigencies of the case required, or the circumstances permitted, the accident was, what has been correctly termed 'unavoidable under the circumstances;' and whether the defendant should, in such case, be holden liable or not, is the question we have in hand. For in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence, or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable. In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been 'unavoidable under the circumstances.' We have seen that if the injury had been consequential, and the form of action case, the defendant would not have been liable, and the question returns whether he can and should be holden liable because the injury was direct and immediate, and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority."

¹ 3 Blk. Com. 3, 4; Hill v. Rogers, 2 Clarke, 67; Hathaway v. Rice, 19 Vt. 102.

² Mellen v. Thompson, 32 Vt. 407.

³ Obier v. Neal, 1 Houston, Del. 449.

⁴ Elliott v. Brown, 2 Wend. 497.

* That it was the plaintiff's own original assault.

a recovery in cross actions for the same affray, but that the party who first recovered might plead that recovery in a suit against himself. In New Hampshire, however, a contrary view has been taken, the Supreme Court of that State holding, in a comparatively recent case,¹ that cross actions will lie for the same affray by the person assaulted for the attack first made upon him, and by the assailant for the excess of force used beyond what was necessary for self-defense.*

¹ Dole v. Erskine, 35 N. Hamp. 503.

* In Dole v. Erskine, *supra*, the court said: "Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and done no act for which he is liable, while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action; the one that is assailed for the assault and battery first committed upon him, and the assailant for the excess of force used upon him beyond what was necessary for self-defense. We think that these are not matters of set-off; that the one cannot be merged in the other; and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force. And upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day, can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after? In Elliott v. Brown, it is conceded that both parties may be indicted, and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear. We arrive then at the conclusion that the causes of action existing in such cases cannot be set off the one against the other, nor merged the one in the other, but that each party may maintain an action for the injury received; the assailed party for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defense. This rule, it appears to us, will do

5. *Defense of property.*

§ 158. By the common law, a man may justify a battery of a person who endeavors wrongfully to dispossess him of his goods or lands, or the goods of another delivered to him to keep.¹ The owner of land may repel by force any forcible attempt to expel him; and his son, acting under his authority, has the same right.² And the lessee of premises has the same right to employ force in maintaining the possession that the owner has.³ * But the mere suspicion or fear of an encroachment will not justify an assault.⁴ If a person unnecessarily stop a horse and wagon in the highway, and there hinder the overseer of highways, or the men under him, while repairing such highway, the overseer may use all necessary and proper force to remove him, if he neglects or refuses to pass along after being requested by the overseer to do so.⁵ In an action for assault and battery at the funeral of a child of a Mr. Prince, it appeared that the plaintiff and defendant were hackmen; that Mr. Prince employed one Potter to superintend the funeral arrangements; that Potter engaged the defendant, among others, to attend with his hack; and that a brother of Mr. Prince, without the knowledge of Potter, had engaged the plaintiff to attend the funeral with his carriage. The plaintiff and defendant both attended with their car-

more justice to the parties and more credit to the law than the other; for by it, the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist."

¹ 3 Blk. Com. 4; 1 Esp. Dig. 314; 1 Hawk. P. C. 130; *Gates v. Lounsbury*, 20 Johns. 427; *Gregory v. Hill*, 8 Term R. 299; *Alderson v. Waistell*, 1 Car. & K. 358.

² *Tribble v. Frame*, 7 J. J. Marsh. 599, 617.

³ *Corey v. The People*, 45 Barb. 262. ⁴ *McAuley v. State*, 3 Iowa, 435.

⁵ *Bull v. Colton*, 22 Barb. 94.

* Where A. gives B. verbal permission "to dig and carry away ore," and B. assigns the license to C., who enters forcibly into the premises of A., the latter being at the time the owner of the freehold, and warning C. not to attempt to enter, C. is a trespasser, and may be resisted by A. with all the force requisite to protect his possession (*Riddle v. Brown*, 20 Ala. 412).

A person who has a right to go on to premises and make improvements, not interfering with the tenant's farming operations, cannot be forcibly ejected, until he actually does so interfere (*McAuley v. State*, 3 Iowa, 435).

riages, and the alleged assault and battery was committed in a contest between them as to their relative position in the funeral procession. It was held that, as Mr. Prince was in the possession of that part of the highway for what was a lawful purpose, he had a right, either personally or through an agent, to direct as to the places in the procession which the carriages engaged by him should occupy, and the drivers, therefore, had a right to follow those directions; and if, in conforming or endeavoring to conform to them, they were prevented from doing so, or obstructed by the plaintiff, they had a right to oppose such acts of the plaintiff, or to defend themselves against any injury from him, by as much force as was necessary, in order to enable themselves to occupy the place in the procession assigned to them. That the proper inquiries were: 1st. Whether the defendant was directed by Potter to occupy the place, and was, while occupying or endeavoring to occupy it, obstructed by the plaintiff; and 2d. If he was so disturbed, whether he used unnecessary force in obtaining or keeping the place. And a verdict having been found for the defendant in the court below, the Supreme Court refused to disturb it.¹

§ 159. The law does not oblige the owner of goods to stand idly by and see a thief or a trespasser take them from his premises, or limit him to mere verbal remonstrance. He may act promptly; and whether he may use force or not in the first instance, and what degree of force, depends upon the exigency of the particular case. The mere taking of the property by the owner, under such circumstances, from the custody of the wrong-doer, without other force or violence, would not constitute an assault and battery. To a count for assaulting the plaintiff, the defendants pleaded that the plaintiff had wrongfully in his possession dead rabbits belonging to the Marquis of E., and was about wrongfully and unlawfully to carry away and convert them to his own use, whereupon the defendants, as the servants of the Marquis, and by

¹ Goodwin v. Avery, 26 Conn. 585.

his command, requested the plaintiff to refrain from carrying away and converting the rabbits, which he refused to do, whereupon they, as the servants of the Marquis, and by his command, *molliter manus imposuerunt*, using no more force than was necessary to take the rabbits from him. Held, a good plea.¹ If the taking, or the attempt to take, is resisted by the trespasser, and he persists in his attempts to retain possession and carry the property off, then the owner may lawfully use so much additional force as may be necessary to prevent it.² In *Baldwin v. Hayden*,³ it was proved that the defendant, having a certain writing, handed it to the plaintiff to read and return to him, but that the plaintiff folded it, and was about carrying it away, when the defendant seized the plaintiff by the collar, threw him down, held him down, and choked him, until he gave the paper up. After a verdict for the plaintiff in the court below, the Supreme Court granted a new trial, because the circuit judge, instead of submitting to the jury the questions: 1st. Was the paper in question delivered by the defendant to the plaintiff to be carried away by him? 2d. If not, did the defendant use more force than necessary to prevent it,—instructed them that, if they should find that the paper was peaceably in the plaintiff's hands, by the consent and delivery of the defendant, he had no right to use the violence proved to recover it. This withdrew from the consideration of the jury the only questions of fact in the case—the *intention* with which the paper was delivered to the plaintiff, and the *quantum* of force employed by the defendant to prevent the abuse of that intention—and directed the jury to the manner of the plaintiff's obtaining the paper, instead of the object of its delivery by the defendant.

§ 160. If a constable, having an execution against A., attempts to take B.'s property from the possession of B., and a bystander, upon being commanded by the officer, forcibly

¹ *Blades v. Higgs*, 10 J. Scott, 713.

² *Gyre v. Culver*, 47 Barb. 592.

³ 6 Conn. 453.

lays hands upon B. to overcome his resistance, B. may maintain an action for assault and battery against the bystander.^{1*}

§ 161. The question as to how far an officer about to make an attachment of personal property upon process against one having in fact no attachable interest in the same, may be resisted by the real owner of the property, has been settled in Vermont by repeated decisions, which have held that such resistance was unlawful; and it follows that a recapture of the property after an attachment would be equally unlawful, inasmuch as the recapture would necessarily in-

¹ Elder v. Morrison, 10 Wend. 128; *ante*, § 25.

* In this case, it was argued for the defendant, that the officer, when indemnified by the plaintiff in the execution, was bound to sell the property; that, by the New York Revised Statutes, it was enacted that, when a sheriff or other public officer should find resistance, or have reason to apprehend it, in the execution of any process delivered to him, he may command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance and in seizing and confining the resisters; that the statute further required that the officer should certify to the court from which the process issued the names of the resisters, to the end that they may be punished for their contempt of such court; and that every person commanded by an officer to assist him, who should refuse without lawful cause, should be deemed guilty of a misdemeanor, and subject to fine and imprisonment (N. Y. Rev. Sts. 5th ed. vol. 3, p. 740). The inference drawn by the defendant's counsel, from the foregoing, was, that the person who comes in aid of an officer to *overcome resistance*, is justified, whether the officer is justified or not; and that the question of title to the property is not a proper subject of inquiry. The plaintiff, on the other hand, contended that, if the principal be a trespasser, all persons acting in his aid or by his command are also trespassers; that the fair meaning of the statute is, that the officer shall be aided in the lawful execution of his process, and that such process must be against the individual whose person or property is attempted to be seized; and that the process, to authorize a justification, must be against the person in possession of the property taken. The Supreme Court, in affirming the judgment of the Common Pleas, which was for the plaintiff, said: "It is certainly true that, if the officer be guilty of a trespass, those who act by his command or in his aid must be trespassers also, unless they are to be excused in consequence of the provision of the Revised Statutes. If a stranger comes in aid of an officer in doing a lawful act, as executing legal process, but the officer, by reason of some subsequent improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. But when the original act of the officer is unlawful, any stranger who aids him will be a trespasser, though he acts by the officer's command. The counsel for the plaintiff in error insists that there is a difference between aiding in the original taking, and the overcoming resistance. It seems to me, that there is no such distinction. If the taking was lawful, the resistance was unlawful. But if the taking was unlawful, the resistance was lawful. If the resistance was lawful, neither the officer nor those he commanded to assist him could lawfully overcome that resistance. Nor does the fact of the officer's being indemnified confer on him any authority which he had not without such indemnity. He may thereby be compelled to do an illegal act in selling the property of strangers to the execution; but he is a trespasser in doing so, as are all others who aid him."

clude resistance to the officer, if done forcibly. The courts of that State have said that if the rule were otherwise, it would many times involve the officer in such perplexing uncertainty that he could not, with any degree of safety, proceed to execute his precept; that questions of property oftentimes depend upon such nice legal discrimination, and upon such an accurate knowledge of facts, that to require sheriffs and other officers to decide at their peril, when opposed, whether to proceed, and to make the legality of their proceedings hinge upon the correctness of that decision, would involve the public peace in constant disturbance.¹ On the other hand, in Massachusetts, it has been decided that the owner of goods which are in his actual possession, may lawfully defend his possession of them against a seizure or an attachment by an officer who comes to take them on a precept against another person who has no right or interest in the goods.² *

¹ *Merritt v. Miller*, 13 Vt. 416; *State v. Fuller*, 8 Ib. 424; *State v. Buchanan*, 17 Ib. 573; *State v. Miller*, 12 Ib. 437.

² *Com. v. Kennard*, 8 Pick. 133.

* In *Com. v. Kennard*, *supra*, the court said: "Certainly, the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment by one who is arrested on a writ or warrant against another person. In such case, there is no authority for the arrest, and the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person arrested, will justify any resistance which may be necessary to defend his personal liberty short of injurious violence to the officer. We cannot distinguish between an officer who assumes to act under a void precept and a stranger who should do the same act without any precept, for a command to arrest the person or seize the goods of B. is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and, considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary. It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover, or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen, but it is not a fair argument against the existence of a right that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion

§ 162. A forcible entry into a house or grounds may be resisted with force, without previously requesting the intruder to depart; unless the forcible entry be made by an officer acting under competent legal authority;¹ and the rule is the same, in the case of the forcible seizure of goods.^{2*}

that it belongs to the debtor, and the owner might be driven to a replevin in which he must give a bond with surety, or to his action for damages, in which the expense may consume the value of the property. But it is again said, that the rule sought to be established by the defense will deprive creditors of the power of trying the question of property in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this, the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty. That a man may defend his person, his lands, or goods against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept."

¹ *Tullay v. Reed*, 1 C. & P. 6; *Polkinhorn v. Wright*, 8 Q. B. 197; *Pitford v. Armstrong*, *Wright*, 94.

² *Green v. Goddard*, 2 Salk. 641; *Owen*, 150; *Weaver v. Bush*, 8 Term R. 78.

* *Wakefield v. Fairman* (41 Vt. 339), was an action by an officer for an assault and battery committed upon him while attempting to attach a stallion belonging to the defendant. At the trial of the cause in the court below, the defendant asked the court to charge the jury that if the attachment was merely colorable, and the real end and purpose was to use the process in order to restore the stallion to the possession of one Eaton, it would be such an abuse of the process that all acts of the officer under it would be a trespass, and would justify the defendant in the employment of reasonable force to protect his property. But the court refused so to instruct. The Supreme Court, in sustaining such refusal, said: "The point made as to the attachment being colorable, involves the assumption that the plaintiff had ample official authority to serve the writ. It is claimed that his being aware of the alleged purpose of the plaintiff in the writ, precluded him from the exercise of official authority. The case shows that the plaintiff in the writ had a valid claim and cause of action against the defendant in it. The alleged illegality of the proceeding involved in the point under consideration, consists in the fact that the plaintiff therein had the purpose of restoring possession of the horse to S. C. Eaton, and the officer, the present plaintiff, being aware of that purpose, was not only deprived of his authority and duty to serve the writ as directed by the plaintiff therein, but became a trespasser in attempting to serve it. Aside from that purpose, it is not claimed that the attachment would not have been entirely lawful. It is virtually conceded that it would have been, and that the efforts of the plaintiff as officer, to make the attachment, would have been lawful and proper. We have a course of decisions in this State, based on unquestioned principle, and countenanced by many cases in England and States of the Union, to the effect that such purpose would not render the attachment of the horse upon that writ unlawful, even as to the plaintiff in the writ. Of course, it would not be unlawful in the officer to make such attachment merely because he was aware of such purpose in the plaintiff. The principle is involved and strongly illustrated in cases for mali-

Where an officer unlawfully breaks open the outer door of a house, and entering, seizes property therein, he may be rightfully opposed in carrying the property away.¹ Unless, however, the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner;² and if a policeman standing by sees the resistance, he may take the intruder into custody, who, by resisting the attempt of the owner of the house to put him out, will be guilty of assault and battery.³

§ 163. As previously stated,⁴ care must be taken not to exceed the bounds of mere defense, prevention or recovery, so as to become vindictive. To an action for assault and battery, the defendant pleaded that he was possessed of a horse and gig which were upon a public highway, and that the plaintiff seized the horse and gig, and was driving them away and dispossessing the defendant of them, and would, in breach of the peace, have dispossessed him of them; wherefore the defendant defended his possession of them and resisted the plaintiff's endeavor, and in so doing committed the said assault. It was held that evidence that showed that the plaintiff seized the defendant's horse for the purpose of merely obtaining his name and address, did not support the plea.⁵ A declaration in trespass charged that the defendant upset a

cious prosecution, in which the plaintiff cannot recover, however virulent the malice, if probable cause for the prosecution existed. In those cases, the plaintiff has the burden of negating the existence of probable cause, as well as of proving the existence of malice" (citing *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Barron v. Mason*, 31 Vt. 189; *Chatfield v. Wilson*, 28 Vt. 49; *State v. Buchanan*, 17 Vt. 573; *Bul. N. P.* 14).

¹ *The People v. Hubbard*, 24 Wend. 369.

² *Scribner v. Beach*, 4 Denio, 448; *Seaman v. Cuppledick*, Owen, 150; *Weaver v. Bush*, 8 Term R. 78; *Hawkins' P. C. b. 1, c. 60, § 23*; 1 *East's P. C.* 406; *post*, § 170.

³ *Wheeler v. Whiting*, 9 C. & P. 262.

⁴ *Ante*, § 152.

⁵ *Gaylard v. Morris*, 3 Exch. 695; 18 L. J. 297.

ladder upon which the plaintiff was standing, and threw the plaintiff from it to the ground. The defendant pleaded that he was possessed of a house and garden, and that the plaintiff erected a ladder in the garden and ascended the ladder in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and told him to come down; and that, as the plaintiff persisted in nailing the board, the defendant gently shook the ladder, gently overturned it, and gently threw the plaintiff from it to the ground, doing as little damage as possible to the plaintiff. Upon demurrer to the plea, it was held that the overturning and throwing down of the ladder, however gently, was, under the circumstances, unjustifiable.¹ One of the marshals of the city of London, whose duty it was on the day of a public meeting in the Guildhall, to see that a passage was kept for the transit to the carriages of the members of the corporation and others, directed a person in the front of the crowd at the entrance, to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying that he would make him. It was held that in so doing the marshal exceeded his authority; that he should have confined himself to the use of pressure, and should have waited a short time to afford an opportunity for removing the party in a more peaceable way.^{2*}

§ 164. The class of crimes in the prevention of which a

¹ Collins v. Renison, Say. 138. See State v. Elliot, 11 N. Hamp. 540.

² Imason v. Cope, 5 C. & P. 193.

* In an action for throwing water over the plaintiff's apartment and herself, it was held no defense that the plaintiff was engaged in obstructing an ancient window of the defendant's house, and that the defendant threw water over her to prevent it (Simpson v. Morris, 4 Taunt. 821). In an action for assault and battery it is not a justification that the plaintiff kept a disorderly house in which were deposited stolen goods, and that the defendants tore down the house as a public nuisance, and in so doing, necessarily assaulted the plaintiff, and somewhat beat, bruised and wounded him (Gray v. Ayres, 7 Dana, 375). The expulsion of a person from his dwelling-house is an injury to the dwelling-house (Meriton v. Coombes, 1 Pr. R. 570; 19 L. J. C. P. 336). "Whenever the justification of any act, alleged to be wrongful and injurious, is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case, the question of the excess of such authority is to be determined by the jury" (Hilliard v. Goold, 34 N. Hamp. 230).

man may, if necessary, exercise his natural right to repel force by force, to the taking of the life of the aggressor, is confined to felonies which are committed by violence and surprise. Foster states the rule thus: "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence and surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary, until he has secured himself from all danger; and if he kill him in so doing, it will be justifiable self-defense;"¹ and even his servant, then attendant on him, or any other person present, may interpose for preventing the mischief.² * Where a slave was stealing property in the night, and the owner of the property, owing to the darkness, could not identify him, and had reason to suppose that the thief could not be apprehended, it was held that the owner of the property might lawfully shoot with intent to disable, but not take life.³

§ 165. If, in an action for the forcible expulsion of the plaintiff from land, the defendant do not show a right of possession, his justification will, of course, fail.⁴ Accordingly, where a landlord enters upon a tenant who holds over after the expiration of his lease, lays hands on the tenant, and turns him out, he cannot truly say that this was done in defense of his (the landlord's) possession; such possession not having been gained until after the exercise of the act of force constituting the assault. But if the tenant, or any other person who has originally lawfully come into posses-

¹ Foster's Cr. L. 259.

² State v. Moore, 31 Conn. 479; Scribner v. Beach, 4 Denio, 448.

³ McClelland v. Kay, 14 B. Mon. 103.

⁴ Post, § 170.

* Blackstone says: "Such homicide as is committed for the prevention of any forcible and atrocious crime is justifiable by the law of nature, and also by the law of England as it stood as early as the time of Bracton" (4 Blk. Com. 180, 181). And he specifies as of that character those which we have spoken of in the text. No others are mentioned by Hale or Hawkins, who wrote prior to Blackstone, or by any writer since (1 Hale's P. C. 488; 1 Hawk. P. C. 71).

sion, voluntarily leaves the premises vacant, the landlord or lawful owner may at once enter and take and keep possession. The previous possessor is then lawfully dispossessed, and if he reenters, he commits a trespass, and may be turned out of the house or off the land.¹ In *Russell v. Dodds*,² which was an action for assault and battery, the facts were as follows: In the interval between the summer and winter schools, one Hutchins proposed to open, in the district school-house, a private school for the children of the district and vicinity, which object was generally concurred in by the inhabitants of the district, though no corporate action was had in relation thereto. Hutchins applied to the defendant, who was the prudential committee of the district, for the use of the school-house, and thereupon the defendant agreed with Hutchins that he might have the school-house for his school for the period of eleven weeks. Hutchins thereupon took possession of the school-house and opened his school. After the school had continued several weeks, the defendant, for no alleged reason, in the absence of Hutchins and his pupils, fastened the door of the school-house, and the defendant, in endeavoring by force to prevent Hutchins and the plaintiff from reentering, used personal violence. The defendant contended that he had no authority to make any such agreement with Hutchins, and that at most it was a mere license, which he might revoke at any time, and resume possession. It was, however, held that the plaintiff was entitled to recover.³ *

¹ *Taylor v. Cole*, 3 Term R. 292; *Browne v. Dawson*, 12 Ad. & E. 624; *Taunton v. Costar*, 7 Term R. 431; *Butcher v. Butcher*, 7 B. & C. 402.

² 37 Vt. 497.

³ *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 B. & Ald. 304; *Bird v. Holbrook*, 4 Bing. 628; *Johnson v. Patterson*, 14 Conn. 1; *State v. Moore*, 31 Ib. 479; *Barnes v. Wood*, 14 Jur. 334; *Blyth v. Topham*, Cro. Jac. 158; *Hardcastle v. South Yorkshire &c. R. R. Co.* 4 H. & N. 74; *Gillis v. Pennsylv. R. R. Co.* 59 Penn. St. R. 129; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; *aff'd*, 4 N. Y. 349.

* In *Russell v. Dodds*, *supra*, the court said: "The defendant in this case assumed to agree with Hutchins that he should have the use of the house for his school for the period of eleven weeks. Hutchins had acted upon this agreement, got up his school, and taken possession of the house, and was fully performing on his part. If his school was broken up before its intended termination, it might, and doubtless would, be a serious loss to him as well as to his pupils. Whether the defendant had exceeded his proper authority in agreeing to let him

§ 166. Even a trespasser on the land of another may maintain an action for a wanton or intentional injury inflicted on him by the owner. The question whether an action can be supported by a trespasser for personal injury caused by a spring gun, man trap, or dog spike set on the grounds of the defendant, has been elaborately discussed in the English courts, and it has been held that when no proper warning has been given, such an action will lie, on the ground that a man cannot lawfully do indirectly that which it is unlawful for him to do directly. He cannot shoot, or maim, or set a ferocious dog upon a mere trespasser, or place there a concealed machine where it will be likely to do the same thing, without warning. In England, as against a trespasser, a person may make any defensive erection, or keep any defensive animal which may be necessary for the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that in these and the like cases the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way. This has been held of spring guns; and it goes on the principle that secrecy is not necessary to the object, or, at least, not so necessary that the means may be used to the hazard of human life or safety. This doctrine was much discussed in *Deane v. Clayton*,¹ in which the defensive erection was spikes or dog spears fixed along hare paths, for the destruction of dogs upon the defendant's premises. The plaintiff's dog being decoyed by a hare and killed, the judges of the Common Pleas were equally divided on the

have the house for eleven weeks or not, we think it does not lie in the defendant's mouth to say that he had no authority to make such agreement, and that therefore he will violate and repudiate it. If the district, his principal, was content, he was bound to be. So far as the defendant is concerned, it is the same as if he had himself been the owner of the house and made such a contract. Having made such a contract, and Hutchins having acted on it, taken possession of the house, and opened his school, the agreement was not revocable by the defendant without cause; nor can he allege his want of legal authority to make the agreement. Hence, when he undertook forcibly to prevent Hutchins from continuing his school in the house during the period he had agreed he might do so, he was acting contrary to law, and such use of force was unlawful, and he would be liable therefor."

¹ 7 Taunt. 489.

question whether an action lay by the owner of the trespassing dog. But they all seem to have agreed that the case would have been different were the life or even the safety of a human being thus put in hazard. Dallas, J., was against the action in that case, and yet he admitted that "the law distinguishes to many and most essential purposes, between property and the life of a man." In respect to such defenses, Best, C. J., in *Holt v. Wilkes*,¹ said, that humanity required that the fullest notice possible should be given, and that the law of England would not sanction what was inconsistent with humanity. In the United States, as we shall have occasion to show hereafter,² a man cannot lawfully maintain on his premises, as a protection against the depredations of trespassers, anything dangerous to life or limb.*

6. *Retaking property.*

§ 167. Where personal property is immediately followed for recapture from the individual taking it, the same rule for the most part holds, as in the defense of property in possession. Hawkins³ says: "It seems certain that even at this day, he who is wrongfully dispossessed of his goods, may

¹ 3 B. & Ald. 304.

² *Post*, § 845.

³ Pl. Cr. 274.

* Although the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for the negligence of himself or servants, or for that which would be a nuisance if it were in a public street or common, yet there is a class of cases in which defendants have been held responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences. In *Lynch v. Nurdin*, 1 A. & E. N. S. 30, the defendant's servant left his horse and cart standing for half an hour in an open street, where the plaintiff with other children got into and about the cart, and teased the horse until he moved forward, and with the cart ran over and greatly injured the plaintiff. In *Birge v. Gardner*, 19 Conn. 507, a child too young to exercise any discretion, by shaking a gate, which the owner had left carelessly standing on his own land, in a lane through which children were accustomed to pass, pulled it over upon himself and broke his leg; and he recovered damages though he was a trespasser. But where the plaintiff fell into a quarry which was left open and unguarded on the unenclosed waste lands of the defendant, over which, in passing from one public highway to another, the public were freely allowed to walk, it was held that the defendant, the owner, was under no legal obligation to fence the excavation, unless it was made so near to a public road or way as to constitute a public nuisance. Williams, J., said: "No right is alleged. It is merely stated that the owners allowed all persons to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. He must take the permission with its concomitant conditions, and, it may be, perils" (*Hounsell v. Smyth*, 7 C. B. N. S. 731).

justify the retaking of them by force from the wrong-doer, if he refuses to redeliver them; for the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought."¹ The property may be taken from the custody of the wrong-doer without a previous request. But unless it was seized, or attempted to be seized forcibly, the owner cannot justify doing anything more than gently laying his hands on the wrong-doer to recover it.² Generally, the only points to be determined in such case are, whether the pursuer has an undoubted right of property and of immediate possession, and whether the individual removing it is a mere wrong-doer. In such case, a recapture of the property is permitted by the individual, when made only with the reasonable exercise of power which the occasion demands. In *State v. Elliot*,³ the alleged assault and battery originated in a controversy as to the ownership of certain windows which had been placed in a dwelling-house by the complainant while it was occupied by her as a tenant at sufferance, she having been told, as she alleged, by the owner of the house, that if she would furnish windows she might take them away when she left. The owner of the house having died, the administrator directed her to leave the premises, and she did so, claiming the windows, the administrator telling her before she left, that if there was such an agreement in relation to them as she stated, it would be fulfilled, but that he could give no authority to her at that time to take them. The building was afterward sold to one Jackman without any reserve of the windows; and Elliot, the respondent, went into possession as tenant of Jackman, neither of them having any notice of the complainant's claim.

¹ See *post*, § 439.

² *Com. Dig. Pleader*, 3 M. 17; *Weaver v. Bush*, 8 T. R. 78; *Scribner v. Beach*, 4 Denio, 448; *Barnes v. Martin*, 15 Wis. 240; *Andre v. Johnson*, 6 Blackf. 375; *post*, § 789.

³ 11 N. Hamp. 540.

Subsequently, the complainant went to the house in the respondent's absence took out the windows, and left with them; and the respondent upon being informed of what she had done, immediately followed to reclaim the property. She had gone about one hundred rods when the respondent overtook her, stopped her horse, turned him partly around, and seized the windows, claiming them as his; and after some struggle and violent language on his part, forced the windows from her, causing some injury to the complainant, but using no more violence than was required to regain possession of the windows. As the windows passed by deed, and the respondent was in actual possession of them as parcel of the premises conveyed, when they were dissevered from the house of the complainant, without leave or authority from any one, the case resolved itself into a question as to the extent of violence which may be exerted by the owner in reclaiming property taken from him by a wrong-doer under a mistaken claim of title, where the retaking attempted is immediately consequent on the taking. It was held that the facts elicited constituted a perfect defense.*

§ 168. Most cases of this kind arise where there is a

* In *State v. Elliot, supra*, the court said: "In the case before us, the true title to the property, as we hold, was in the individual under whom the respondent claimed as tenant. At the same time, there is no doubt the complainant supposed the property belonged to her, and that she might lawfully remove it. The circumstances were such as would not call for, or justify an aggravated case of violence, and fortunately none such occurred. It does not appear that the respondent in any manner seized upon the person of the complainant, or that any injury occurred, except what was merely incidental to the removal of the windows from her possession, and this was caused by the tenacity of the complainant in holding to the property. There was no immediate contact of the parties themselves, and nothing indicating a design of personal violence. There was some irritation of feeling manifested in language; but the sole force used was directly upon the property, until it was relinquished, owing to the weaker hold of the complainant. If there is any case, where a recapture of property wrongfully taken, and which the party is at the same time moving, may be permitted, it would seem as though this might be one; and if force may be at all allowed, we could hardly expect a less degree of it than was here used. We deem it our duty to be especially cautious in permitting an injured party to take his redress into his own hands. It is most usually a dangerous experiment for him, and for the peace of the community, so to do. Circumstances at times render this power necessary. In the present case, the respondent went as far as was advisable, or perhaps justifiable to go. But as it does not appear that he transcended his rightful exercise of power, we regard his justification as sufficient, and that he cannot, under such circumstances, be held guilty of an assault and battery."

felonious intent. When such is the cause of the taking, the urgency of a recapture is vastly greater than where the taking arises from a mere conflicting claim of title in the property. In the former case, a greater degree of force may with propriety be resorted to than in the latter. But a resort to any unusual degree of violence where there is no felonious intent—or where the violence is disproportioned to the exigency—or where there are other remedies equally effective—should not be encouraged, and will always admit of more or less doubt whether it can be justified.

§ 169. The right to retake land which is in the wrongful possession of another, depends upon somewhat similar principles with the right to retake personal property. In an early case in Vermont,¹ the court held the following language: “If the defendants went into possession without right, and as mere trespassers upon the plaintiff’s rights, he having a superior right to the land, he might well put the defendants out of such wrongful possession, and if he did it by force even, he would acquire a rightful possession, and would, at most, only be liable for a breach of the peace, or a trespass upon the person of the defendants. It was formerly considered that the proprietor of land, who found an intruder in quiet possession of the same, must resort to his legal remedy, and could not forcibly expel such wrong-doer. But it is now well settled, that such intruder may be forcibly expelled, so far as the land is concerned. If the owner of the land is guilty of a breach of the peace, and trespass upon the person of the intruder in so doing, he is liable for that; but his possession of the land is lawful, and he may maintain it, or sustain any proper action for an infringement of it.” But necessary force to eject the trespasser after he shall have intruded into the premises, is the utmost remedy which the law allows by the act of the owner.² And if the trespasser be allowed to continue on the land, and the owner sleeps upon his rights, he will gain a possession, and cannot be

¹ Beecher v. Parmele, 9 Vt. 352.

² Loomis v. Terry, 17 Wend. 496.

forcibly ejected.¹ In *Mugford v. Richardson*,² it appeared that the plaintiff was the tenant of the defendant; that having failed to pay rent, and being notified to quit, the defendant entered the house and proceeded to take out the windows; and that while the defendant was so doing, he was resisted by the plaintiff, which resulted in the alleged assault and battery. The following instruction at the trial in the Superior Court, was held correct:—"That the defendant had a right to enter the premises and take out the windows, provided he created no breach of the peace; that if the plaintiff undertook to prevent him, he might use as much force as was required to overcome her resistance; and that if he used more force than was necessary for that purpose, and she was injured by reason of such excess of force, the plaintiff was entitled to recover for the injuries thereby sustained." In an action for an assault, the defendant pleaded that the plaintiff entered the defendant's close without leave and license, and that the defendant ordered him off, and that he not going, the defendant *molliter manus*, &c. Replication *de injuria*. It was held that it was not necessary for the defendant to rebut all leave and license, because that was not material to the issue; the defendant's justification being complete, if he could show that he required the plaintiff to leave the close, and the plaintiff refused to do so, although the plaintiff had, in fact, entered, at first, by the leave and license of the defendant, such leave and license lasting only during the defendant's pleasure.³

§ 170. If the owner of land assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully after their title to occupy has been determined, he will be liable for the assault.⁴ The law does not allow a person to redress his private wrongs. He may

¹ *Browne v. Dawson*, 12 Ad. & E. 624.

² 6 Allen, 76.

³ *Jelly v. Bradley*, 1 Car. & M. 270.

⁴ *Newton v. Harland*, 1 Sc. N. R. 474; *Pollen v. Brewer*, 7 C. B. N. S. 373; *ante*, § 165.

make use of force to defend his lawful possession; but being dispossessed he has no right to recover possession by violence and breach of the peace, much less by the infliction of personal injury. This principle applies to the possession and dispossession of personal property;¹ and it ought, especially, to be rigidly observed in relation to a man's dwelling-house, in which he is peculiarly protected by the law.² In an action for attacking the plaintiff with a deadly weapon, the defendant undertook to justify that he was, at the time mentioned, lawfully seized of a messuage and dwelling-house, of which he ought then to have been in the quiet and peaceable possession, but which at the time when, &c., was unlawfully withheld from him by the plaintiff, he then being, and before having been, in the unlawful possession of the same, and that for the purpose of entering his said dwelling-house, he committed the assault and battery complained of, as lawfully he might, using no more force than was necessary to overcome the unlawful resistance of the plaintiff. The plaintiff replied, that he and his son, and family had been, for the space of a year before the time when, &c., and at that time was in the quiet possession of the dwelling-house, as his and their home, when the defendant made a violent attack on the plaintiff, and beat and bruised him in manner set forth in the writ. It was held that the plaintiff was entitled to recover.^{3*}

7. *Right of owner or occupier of premises to eject persons therefrom.*

§ 171. The owner or rightful occupant of land or prem-

¹ *Ante*, § 162.

² 3 Blk. Com. 4, 5; *Gregory v. Hill*, 8 Term R. 299; *Hyatt v. Wood*, 3 Johns. 239.

³ *Sampson v. Henry*, 11 Pick. 379.

* A tenant in common, cannot lawfully assault one who enters upon the land by permission of his cotenant (*Causee v. Anders*, 4 Dev. & Batt. 246).

Where the duly authorized agent of a tenant in common, of land, goes thereon to remove his principal's share of the crops, and is forcibly ejected therefrom by the cotenant, the latter is guilty of an assault and battery (*Com. v. Rigney*, 4 Allen, 316; *citing Com. v. Randall*, 4 Gray, 36; *Com. v. Presby*, 14 Ib. 65; *Walker v. Fitts*, 24 Pick. 191; *Chandler v. Thurston*, 10 Pick. 205; *Com. v. Lakeman*, 4 Cush. 597).

ises has a legal right to control it, and to allow whom he pleases to enter and remain there. But if he desires a person to leave, he must first request him to do so, and if such person refuses, he can then use so much force as is necessary to put him out.¹ And although one enters the office of another for the purpose of transacting business, the owner or his agent may eject him after a request to leave and a refusal, using no more force than is necessary.² In an action for assault and battery by A. against B., it appeared that A., having been turned out of the liquor store of B., where he had become drunk, went back flourishing a knife and threatening B., whereupon the latter retreated a little and then struck A. with a stick. The court refused to instruct the jury that the plaintiff deserved more forbearance at the defendant's hands on account of having become intoxicated at his bar, but charged them that the defendant's store "was his castle," and that no person, after being ejected from it, had a right to return unless armed with legal authority.³ Where goods are placed in a shop window with the price marked on them, the shopkeeper is not obliged to sell them at the price indicated; and if a person insists upon having the goods, and refuses to leave the shop, after being requested by the shopkeeper or his servants, he may be ejected.⁴*

¹ State v. Woodward, 50 N. Hamp. 527.

² Woodman v. Howell, 45 Ill. 367.

³ Pierce v. Hicks, 34 Geo. 259.

⁴ Timothy v. Simpson, 6 C. & P. 500.

* Where, in an action by a female employee in a factory against the superintendent for using improper force in ejecting her for disorderly conduct, the judge charged the jury that if, during the process of ejecting her from the room, the defendant used unnecessary and improper force and violence towards her, he thereby became a trespasser *ab initio*, and would be liable for all his acts; it was held that the instruction was erroneous, because the defendant was not in the exercise of any authority conferred by law when he committed the alleged assault. "He had the legal right to use the kind and degree of force necessary and appropriate to protect his person and his employer's property from the disorder and misconduct of the plaintiff. But the parties stood on equal terms in this respect. Their relation to each other was created by contract, and the right of the defendant to remove the plaintiff from the room for misbehavior was an incident to that relation" (Esty v. Wilmot, 15 Gray, 168).

It is as unlawful for a grown son or daughter to create a disturbance in the family as for a mere stranger, and the father may as rightfully interpose to preserve the good order and propriety of the household. Where a married daughter, who lived with her father, engaged in an angry dispute with the servant girl,

§ 172. The owner or occupier is not, however, permitted to invite or allow another to enter in order to irritate or insult him, and thus make an excuse for committing an assault and battery upon him. Where A. entered a book store with the permission of the owner, and conducted himself peaceably, and B., who was a partner of the owner, and had a right to the possession in common with him, seeking for an occasion to lay hands on A., in order to injure and abuse him, used insulting language to irritate and provoke him, and requested A. to leave the store, and A. refusing to depart, B. forced him towards the door, it was held that B. was liable for the assault.¹ *

§ 173. When a person enters another's premises for a lawful purpose, which he has a right to accomplish before leaving, he may resist an attempt to put him out. Accordingly, where in an action for assault and battery, it appeared that the defendant went to the plaintiff's house with a subpoena, which he was authorized by law to serve, that the person upon whom he was to make service was in the house, and that, having found the door open, he entered peaceably, it was held that the plaintiff, by resisting the defendant in making such service, was guilty of an unlawful act; that the defendant was justified, notwithstanding such resistance, in

and refused to desist when requested by her father to do so, it was held that he was justified in employing whatever force was necessary to preserve the peace of his family (*Smith v. Slocum*, 62 Ill. 354).

¹ *Watrous v. Steel*, 4 Vt. 629.

* In the above case, the following instructions of the court below were held correct: "That, if the plaintiff was in the book store making a noise or disturbance, the defendant, after requesting him to depart, might lawfully use all necessary force, short of actual striking, to put him out; but, although the defendant had such right, yet as the plaintiff entered the store by license, if the jury found that he was conducting himself peaceably, and making no disturbance there, and that the defendant was the aggressor, and used insulting language to the plaintiff to irritate and provoke him, they would inquire (although the defendant requested him to leave the store, and he refused) whether the assault was made upon the plaintiff to remove him from the store and in defense of his possession, or whether it was done without such intent, and the occasion was sought by the defendant to lay hands upon the plaintiff for the purpose of injuring and abusing him. If they found that the assault was committed for the former cause, they would return a verdict for the defendant; if for the latter purpose, the defendant's plea of justification was not supported."

using all the force necessary to enable him to serve the subpoena; and that he was only liable for violence used by him more than was necessary to overcome the plaintiff's resistance.¹ And an action of trespass may be maintained against a clerk of court who forcibly turns a person out of the clerk's office without cause, though such person went there merely from motives of curiosity.²

8. *Right of innkeeper to exclude or expel persons.*

§ 174. As an innkeeper holds out his house as a public place to which travelers may resort, he cannot prohibit persons who come in that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them. But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition. He is not obliged to receive one who is not able to pay for his entertainment. As he is indictable if he usually harbor thieves, and is answerable for the safe keeping of the goods of his guests, he is not bound to admit one whose notorious character as a thief furnishes good reason to suppose that he will purloin the goods of his guests, or his own. So, likewise, as he is liable if his house is disorderly, he cannot be held to wait until an affray is begun before he interposes; but may exclude common brawlers, and any one who comes with intent to commit an assault or make an affray. And he may prohibit the entry of one whose misconduct in other particulars, or whose filthy condition would subject his guests to annoyance. He has a right to prohibit idle persons and common drunkards from entering, and to require them and the others before mentioned to depart if they have already entered. And any person entering not for a lawful purpose, but to do an unlawful act—as to commit an assault upon one rightfully there—will be deemed a trespasser.³

¹ Hager v. Danforth, 20 Barb. 16; reversing s. c. 8 How. 435.

² O'Hara v. King, 52 Ill. 303.

³ Hawk. Cr. L. ch. 78, § 1; Bac. Abr. Tit. Inns; Story on Bailment, § 307.

§ 175. As an innkeeper is bound to admit travelers under certain limitations, he may likewise be held, under proper limitations, to admit those who have business with them as such. This may be considered as derived from the right of the traveler. There may be such connection between travelers and those engaged in their conveyance, that the latter, although not specially sent for, may have a right to enter a common inn; or such that the landlord, if he give a general license to some of those whose business is connected with his guests, in their character as travelers, cannot lawfully exclude others pursuing the same business, and who enter for a similar object. There seems to be no good reason why the landlord should have the power to discriminate in such cases, and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests, the same lawful purpose, comes in a like suitable condition, and with as proper a demeanor, any more than he has the right to admit one traveler and exclude another merely because it is his pleasure. If one came to injure the house, or if his business operated directly as an injury, that would present a different question. And perhaps there may be cases in which an innkeeper may have a right to exclude all but travelers and those who have been sent for by them.¹*

¹ Markham v. Brown, 8 N. Hamp. 523.

* In the case here cited, which was an action against a stage driver and stage proprietor for entering the plaintiff's house, being a common inn, and making a disturbance there, the court stated the law as follows: "The defendant had clearly a right to establish a line of stage coaches, and to go to the plaintiff's inn with travelers, and he might, of course, lawfully enter it for the purpose of leaving their baggage and receiving his fare. And we are of opinion that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff, to enter the plaintiff's inn for the purpose of tendering his coach for the use of travelers and soliciting them to take passage with him, and for that purpose to go into the common public rooms of the inn where guests were usually placed to await the departure of the stages, although he was not requested by such guests; provided there was a reasonable expectation that passengers might be there, and he came at a suitable time, in a proper manner, demeaned himself peaceably, and remained no longer than was necessary, and was doing no injury to the plaintiff. But the defendant might forfeit this right by his misconduct, so that the plaintiff might require him to depart, and expel him; and if, by reason of several instances of misconduct, it appeared to be necessary, for the protection of his guests or of himself, the plaintiff might prohibit the defendant from entering again until the ground of apprehension was removed. Thus, if affrays or

§ 176. If a person conducts himself in a disorderly manner in a public house, and the landlord requests him to depart, and he refuses to do so, the landlord is justified in laying hands on him to put him out.¹ If while the landlord has hold of him to put him out, he lays hands on the landlord, this is an assault, and the latter may repel force by force;² and the landlord will be justified although he does not succeed in ejecting him.³ Trespass for assaulting the plaintiff and striking him with a bludgeon, and with the said bludgeon striking and pushing him down to and upon the ground: pleas, first, not guilty; secondly, as to assaulting, beating, and ill treating the plaintiff; that the defendant was the possessor of a public house, that the plaintiff made a great noise and disturbance therein, and obstructed the business, whereupon the defendant requested him to cease from making such noise and disturbance, and to leave the house, which he refused to do, whereupon the defendant, in defense of his possession, *molliter manus imposuit*, to remove the plaintiff, and did remove him out of the house; thirdly, as to assaulting, beating and ill treating the plaintiff, *son assault demesne*; replication to the two latter pleas, *de injuria*. At the trial, the judge directed the jury that even though the plaintiff assaulted the defendant first, yet if the defendant struck the plaintiff with a bludgeon, he was not justified on the pleadings. It was held that this was a misdirection.⁴

§ 177. If a person without committing any assault, make such noise or disturbance in a public house as would create

quarrels were caused through his fault, or he was noisy, disturbing the guests in the house, interfered with its due regulation, intruded into the private rooms, remained longer than was necessary after being requested to depart, or otherwise abused his right, as by improper importunity to guests to induce them to take passage with him, the plaintiff would have a right to reform that and, if necessary, to forbid the defendant to enter, and treat him as a trespasser if he disregarded the prohibition."

¹ Howell v. Jackson, 6 C. & P. 723; Webster v. Watts, 11 Q. B. 311; 17 L. J. 73.

² Howell v. Jackson, *supra*.

³ Moriarty v. Brooks, 6 C. & P. 684.

⁴ Howell v. Jackson, *supra*.

alarm, and disquiet the neighborhood and the persons passing along the adjacent street, this would be such a breach of the peace as would not only justify the landlord in turning the person out of the house, but also in immediately giving him into the custody of a peace officer, provided that this had occurred in the presence of the officer. It was accordingly held to be a good plea in justification to a declaration for assaulting and seizing the plaintiff and forcing him to go as a prisoner from a public house to a police station, that the defendant was lawfully possessed of a house being a tavern, &c., that the plaintiff came into the house and made a disturbance, and assaulted the defendant and others there, and afterwards stood and remained in the public highway, near and opposite to the door of the said house, and made a disturbance there, and used menacing language to the defendant and his family then in the said house and within hearing, and that by reason of such the plaintiff's conduct, while he so stood, &c., many persons while he so stood, &c., congregated in the said highway, near to, and opposite, &c., and made a noise, disturbance and riot in the said highway, near, &c., in breach of the peace and to the obstruction of the defendant's business, and of the said highway; and at the time of the removal afore mentioned, the plaintiff persisted in so standing, &c., making such noise, &c., and by reason of his so standing, &c., making, &c., was causing many people to congregate in the said highway, opposite and near to, &c., in breach of the peace and to the obstruction of the said highway, although before such removal, and while he was so standing, &c., making, &c., he was requested by the defendant to depart, &c., and to cease from making such noise, &c.; wherefore the defendant, in order to restore and preserve the peace, and to get rid of the nuisance so occasioned by the plaintiff, just before the time when, &c., gave the plaintiff in charge to A. B., a constable, and required A. B. to remove the plaintiff and deal with him according to law; and A. B. then being such constable, thereupon removed the plaintiff and took him to the police station, and detained him there,

to be dealt with according to law, and examined by a justice of the peace, and for the purpose of so doing, and in so doing, committed the trespasses.¹

9. *Expulsion from religious meeting.*

§ 178. A religious society may lawfully prescribe such rules as they think proper for keeping order during public worship, and may use necessary force to eject a person making a disturbance.² But the offender must first be requested to retire; though it is not necessary to show that the disturbance was wilful.³ *Wall v. Lee*⁴ was an action for assault and battery alleged to have been committed in a Roman Catholic church. The plaintiff was a member of the congregation, and also a pewholder. The defendant, Gorman, was a member of the same congregation. The defendant, Lee, was a Roman Catholic clergyman and pastor of the church. He rented out the pews, conducted the religious services, and had the exclusive charge of the church edifice, the right of property in which was in the bishop. On Sunday there was divine service in the church, conducted, as usual, by the defendant Lee. In the course of his sermon he alluded, without naming him, to some member of the congregation who had young ladies at his house, and drinking and dancing on Saturday night, which lasted until some time into the morning of Sunday, and that some of the party became intoxicated. These revels and practices the preacher condemned as unworthy pastimes. When the sermon was closed, and before the congregation was dismissed, the defendant Lee came down from the pulpit to take up a collection. It was the custom for the pastor to call upon each member of the church in his seat and personally solicit his subscription or contribution. The pastor came to the plaintiff's pew, and solicited his contribution. The plaintiff immediately rose

¹ *Ibid.*; see *post*, § 315.

² *Ballard v. Bond*, 1 Jur. 7.

³ *McLain v. Matlock*, 7 Ind. 525.

⁴ 34 N. Y. 141.

from his seat, and in a voice louder than usual began to interrogate the defendant in regard to what he had said about the dancing, and stated that what had been said was false, and demanded the name of the defendant's informer. The defendant requested him to sit down or go out of the church; to which the plaintiff replied that he would not go out for him or any other man, until he got an explanation. The defendant again told him to sit down, and he said he would not. The defendant Lee then took him by the collar of the coat, and attempted to put him out, and failed. He then called for aid to remove the plaintiff from the church, and the defendant Gorman came to his assistance. Both of them took hold of the plaintiff's coat collar, and endeavored, by pulling him from the pew, to remove him from the church. The plaintiff resisted, and they were unable to effect their purpose, and so desisted. There was no striking. At the trial in the court below, the jury, under the charge of the judge, found a verdict for the plaintiff of \$200. The judge, among other things, charged the jury, that in order to justify the removal, or attempt at removal, it must be made to appear that the person so forcibly removed, or attempted to be removed, was guilty of wilfully disturbing the meeting. The verdict was, however, set aside by the Court of Appeals.*

* In *Wall v. Lee*, *supra*, the New York Court of Appeals, per Davies, J., in reversing the judgment, said; "The fact of disturbance, and refusing to depart upon request, were the essential and only elements necessary to a justification of the trespass and assault. There is not an intimation in any of the cases that the disturbance must be wilful; and no such qualification of the offense has ever been deemed requisite to justify the removal or attempted removal of the offender. The precedents of pleas contain no countenance of the idea that the noise or disturbance which justifies the *molliter manus imposuit* to turn the offender out, must be wilful. There was no warrant, therefore, in that part of the charge of the learned justice to the jury, that to justify the removal or attempted removal of the plaintiff, they must be satisfied that he was guilty of a wilful disturbance of the meeting. If it had been a proceeding to convict the plaintiff under the statute, then this rule of evidence would have been appropriate; and the error of the learned justice consists in the position that the same evidence was requisite to justify a removal or attempted removal, as would have been required for a conviction under the statute. * * * Religious meetings would lose all solemnity and usefulness if turned into halls of disputation, and any and every one could call upon the minister for explanation of his sermons, or be permitted to engage in controversy with him pending the services. Such

10. *Expulsion from place of public amusement.*

§ 179. The sale of a ticket of admission to a place of public amusement is a license to the purchaser of the ticket to enter and remain during the performance. But the license may be revoked before the purchaser has taken his seat, who, if he remain and refuse to depart upon request, becomes a trespasser, and may be removed by the employment of so much force as his resistance renders necessary.¹ * To an action for assault and false imprisonment, the defendant pleaded that, at the time of the supposed trespass, the plaintiff was in the close of E., and that the defendant, as the servant of E., and by his command, *molliter manus imposuit* on the plaintiff to remove him from the close, which was the trespass complained of. The plaintiff replied that he was in

exhibitions would be most unseemly, and convert our churches into arenas for controversy and ill-feeling. It is most appropriate that the minister or priest should preserve order, and rebuke all violations of it. As the acknowledged presiding officer of the meeting, it is his duty to check all attempts to interrupt its order, quiet, and solemnity; and for this purpose, he unquestionably has full power and authority to call upon others to aid him, or direct them to remove the offender. In this sense, therefore, he has a greater right to enforce order, and use force for that purpose, than any other member of the congregation."

In a recent case in Massachusetts it was held that the sexton of a church whose duty it is to take charge of, and conduct funerals there, may lawfully eject from the church an undertaker who, upon being requested to desist and leave, refuses, and persists in unauthorized intrusion (Com. v. Dougherty, 107 Mass. 243).

¹ Burton v. Scherpf, 1 Allen, 133; Nettleton v. Sikes, 8 Metc. 34; Claffin v. Carpenter, 4 Ib. 580; Giles v. Simonds, 15 Gray, 441.

* The remedy of the buyer of the ticket in such case is an action to recover the money paid, and damages for breach of contract.

In Burton v. Scherpf, *supra*, the general proposition that a parol license by the owner of real estate to enter or do any particular act upon it, may commonly be revoked at any time before the object and purpose for which it was conceded has been fully availed of or wholly accomplished, was not disputed by the plaintiff. But he claimed that as the contract under which his license was derived was either wholly or in part executed, and as he was in the actual enjoyment of the privilege conferred upon him at the time when the defendant undertook to revoke it, the right of revocation was lost, and could no longer be asserted. This claim was founded upon the clear and well-recognized distinction between a mere license, which neither passes any interest, nor alters or transfers property in anything, but only makes an action lawful which would otherwise have been unlawful; and a license coupled with a grant, or arising from a sale of property to be taken and carried from the land where it is situate or upon which it is placed. In the latter case, it is irrevocable so far as the contract is executed (Ruggles v. Lesure, 24 Pick. 187; Hewlins v. Shippam, 5 B. & C. 221; Thomas v. Sorrell, Vaughan, 330).

the close by the leave and license of E., which was traversed by the rejoinder. The evidence was that E. was steward of the Lancaster races; that tickets of admission to the grand stand were issued with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure, around it; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of E., desired him to leave, and on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting, put him out, using no unnecessary violence, but not returning the guinea. It was held that the jury were properly directed to find the issue for the defendant.¹ *McCrea v. Marsh*² was an action for an assault in forcibly excluding the plaintiff from a theater in Boston, on account of his color. It appeared that the plaintiff having bought the usual ticket, offered it to the door-keeper in attendance at the head of the staircase leading to the "family circle," and that the door-keeper, acting under the orders of the defendant, forcibly prevented his entrance. The Supreme Court held that it was correctly ruled at the trial in the Superior Court that the plaintiff could not maintain the action.*

¹ *Wood v. Leadbitter*, 13 Mees. & W. 838.

² 12 Gray, 211.

* In *McCrea v. Marsh*, *supra*, the court said: "Assuming that the plaintiff, by the purchase of the ticket from the defendant, obtained permission to enter the family circle in the Howard Athenæum in his own person, and occupy a place there during the exhibition, yet it was only an executory contract. It was a license legally revocable, and was revoked before it was in any part executed. After it was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry. The plaintiff is, doubtless, entitled to recover in an action of contract the money paid by him for the ticket, and all legal damages which he sustained by the breach of the contract implied by the sale and delivery of the ticket" (citing *Wood v. Leadbitter*, 13 M. & W. 838; *Adams v. Andrews*, 15 Ad. & El. N. R. 284; *Roffey v. Henderson*, 17 Ad. & El. N. R. 574; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Foot v. New Haven & Northampton Co.* 23 Conn. 214; *Jamieson v. Millemann*, 3 Duer, 255).

By a private act of Parliament, the shire hall of G. was vested in the justices of the peace for the county, in trust to allow courts of justice to sit there, &c., and to permit and suffer it to be used for such other public purposes as a major part of the justices in session should direct. The hall had always been used for the holding of the county musical festivals, but there was no evidence that the justices had under the act so directed it to be used. It was held that the stewards of one of the musical festivals had such a possession of the hall that they might justify turning out an intruder (*Thomas v. Marsh*, 5 Car. & P. 596).

11. *Forcible removal from public conveyance.*

§ 180. A corporation may become liable to respond in damages for an assault and battery committed by its servants in the execution of its orders;¹ * and it may also be so charged, whenever the personal violence was the probable and natural result of the orders given, within the rule that a master is liable for the wrongful acts of his servant committed in the master's employment, although, in so doing, the servant has departed from the instructions of his master.²

¹ Eastern R. R. Co. v. Broom, 6 Exch. 314; 15 Jur. 297; 20 L. J. Exch. 196; Goff v. Gt. North. R. R. Co. 30 L. J. Q. B. 148; Chicago &c. R. R. Co. v. McCarthy, 20 Ill. 385; Alton and Chicago R. R. Co. v. Dalby, 19 Ib. 353; Jackson v. Second Av. R. R. Co. 47 N. Y. 274; Passenger R. R. Co. v. Young, 21 Ohio, 518.

² Higgins v. Watervliet T. Co. 46 N. Y. 23; *ante*, § 42, *et seq.*

* In Smith on Master and Servant, 157, it is said if the act be done in the execution of the authority given him by his master, the latter will be holden for wanton acts, if done in order to perform his orders.

A person engaged in the business of transporting passengers cannot by an agreement exempt himself from liability for any injury resulting from any wilful or wanton misconduct of his own. That a party should be permitted to contract that he may with impunity inflict wanton injury upon others is repugnant to every sentiment of justice and propriety.

The principle is, that parties cannot contract that they themselves may with impunity be guilty of wilful misconduct, or of that degree of recklessness which is its equivalent. To this extent, do doubt, carriers of passengers are precluded from absolving themselves by contract from their responsibilities. But the rule has no application to contracts exempting them from liability for the acts of third persons. There is some difficulty in applying these principles to railroad companies, on account of the artificial nature of corporations. As they can act only through agents, it may be said, on the one hand, that every act of their authorized agents, and, on the other, that no such act, is to be regarded as a direct act of the corporation. But a distinction is, no doubt, to be made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the powers of the corporation, and are its only direct medium of communication with outside parties, they must, in respect to all its external relations, be considered as identical with the corporation itself. No contract, therefore, can exempt a railroad company from liability for the wilful or wanton misconduct or gross recklessness of its directors. The rule is not confined to common carriers and other bailees, but, from its nature, must be general in its application (Perkins v. The N. Y. Cent. & R. Co. 24 N. Y. R. 196, per Selden, Ch. J.)

There is a degree of recklessness which can scarcely be distinguished from a wanton or wilful disregard of duty. It is equally reprehensible, and its consequences are in general held to be the same. It is to this degree of negligence to which Welles, J., in Parsons v. Monteath, 13 Barb. 353, seems to refer when he says that "a contract which should excuse the carrier from liability for damage or loss arising from his own fraud or gross negligence would not be enforced." And see Jones on Bailm. 11; Wells v. The Steam Nav. Co. 4 Seld. 375; Catlin v. The Springfield Ins. Co. 1 Sumn. 434; Thurtell v. Beaumont, 1 Bing. 339.

In *Greenwood v. Seymour*,¹ where the conductor of a public conveyance ejected a passenger for what he deemed improper conduct, and, in doing so, committed acts of personal violence to such a degree as to cause great injury to the party, the principal was held liable therefor. The argument was pressed upon the court that the conductor was a trespasser, and that the principal should not be held for a trespass committed by his servant; but the court held otherwise, when the act complained of was done in the execution of the duties assigned to him by his master. That was an action on the case. And, in *Sandford v. The Eighth Av. R. R. Co.*,² it was held that the master was responsible for the act of his servant in wrongfully ejecting a passenger from the train, and responsible also for any acts of aggravation in doing the act causing an injury to the passenger. This judgment was based upon the principle that a part of the duties of the servant was to exclude from the cars such passengers as refused to pay fare, or to comply with the regulations adopted by the company; and that having authority from the master to perform the acts, all such acts done by the servant were to be regarded as done by virtue of this authority.

§ 181. If, however, the person committing the assault acted beyond the scope of his authority, the corporation is not liable. Where, therefore, a station-master arrested a railway passenger in charge of a horse, for not paying for its transportation, and the railway company could not lawfully arrest a person for such non-payment, but only detain the property, it was held that, as the station-master exceeded his authority, the company was not responsible.³ A female desiring to get out of a street car, stepped to the platform and asked the conductor to stop the car, declaring that she would not alight until the car had stopped; whereupon he threw her violently on to the pavement and seriously injured her.

¹ 4 Law Times, N. S. (1861), 835.

² 23 N. Y. 343.

³ *Poulton v. Lond. & S. Western R. R. Co.* 2 L. R. Q. B. 534.

It was held that the company was not liable.¹ In an action for forcibly ejecting the plaintiff from railroad cars; upon his refusing to pay the fare demanded, the plaintiff claimed that, for the purpose of removing him from the cars and keeping him off, the conductor called to his assistance a servant of the defendants; that thereupon a struggle ensued between the plaintiff on one side, and the conductor and his assistant on the other, and that before the termination of the struggle, and immediately upon the plaintiff's coming from the car to the ground, the servant intentionally kicked him in the face. The defendants claimed that such kick, if given, was without the knowledge, and without any particular or express direction, of the conductor or any other officer or agent of the company. The judge having instructed the jury that, upon the facts as claimed by the plaintiff, the defendants were liable for the kick, the Supreme Court granted a new trial for misdirection.^{2*}

§ 182. A question with respect to responsibility has arisen where the order is of such a character that, if properly done, it may be executed in a manner which, in law, would

¹ *Isaacs v. Third Av. R. R. Co.* 47 N. Y. 122.

² *Crocker v. The New Lond. &c. R. R. Co.* 24 Conn. 249; and see *Milwaukee &c. R. R. Co. v. Finney*, 10 Wis. 388.

* In *Crocker v. The New London &c. R. R. Co.* *supra*, the court said: "The jury should have been instructed, in substance, that if the kick was given by the servant for the purpose of keeping the plaintiff off the car, and was, under the circumstances, but the exercise of necessary and proper force for that purpose, the defendants were responsible for it, provided the plaintiff had been wrongfully put out and had a right to re-enter. But if such kick was not necessary and proper, for the purpose of keeping the plaintiff off, and was given by the servant intentionally, without the knowledge or direction of the conductor or any other officer or agent of the company, the defendants were not liable for it. In this case, the servant was called to assist the conductor, and may be considered as having a general order or command to keep the plaintiff off. But that order authorized the employment of none but usual and legal means for the purpose; and the intentional employment of such an unusual, unnecessary and unjustifiable measure as a kick in the face, could not have been contemplated by the conductor, and, in the absence of proof, the law will not deem it authorized by him."

The defendant hired a steamboat for an excursion to R., the owner's captain navigating her. It was held that the defendant did not have such a possession as to justify him in forcibly turning out a stranger whom the captain had allowed to come on board (*Dean v. Hogg*, 10 Bing. 345; 4 M. & Scott, 188; 6 Car. & P. 54).

constitute no breach of the peace, nor subject any party to any liability for executing it. In cases of this character, where the agent, in the execution of the order, does it with such violence and, in such a careless or wanton manner as to inflict an unjustifiable personal injury upon the person ordered to be seized and removed, the position has sometimes been taken and maintained, by adjudicated cases, that the principal is not liable at all, or, if liable, that a claim for damages can only be enforced in an action on the case.¹ The more consistent rule would seem to be, that where a corporation gives an order to a servant to do an act which implies the use of force and personal violence to others, if the servant, in the execution of that service, goes beyond proper limits as to the use of force, and commits a trespass by unjustifiable violence, and inflicts an injury by a blow or a kick upon the person attempted to be removed, the corporation will be liable to an action of trespass therefor.² In *Hewett v. Swift*,³ the president of a railroad company had directed the servant of the company to keep boys out of the depot, pursuant to a regulation of the company, and the servant, in removing a boy about fourteen years of age, who refused to leave, kicked and severely injured him. It was held that a joint action of trespass might be maintained against the company and its servant. In an action against a railway company for the act of the conductor in ejecting the plaintiff from the cars, the judge at the trial in the Common Pleas charged the jury that if the conductor, in putting the plaintiff out of the cars, acted by direction of the company, the company were liable; but that if the company directed the conductor to put out of the cars passengers who had not paid their fare, and he put out passengers who had paid their fare, the company would not be responsible for his acts. A

¹ *Hibbard v. The N. Y. & Erie R. R. Co.* 15 N. Y. 455; *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 Ill. 353.

² *Ramsden v. Boston &c. R. R. Co.* 104 Mass. 117; *Phila. & Reading R. R. v. Derby*, 14 How. 468.

³ 3 Allen, 420.

verdict having been found for the plaintiff, the Supreme Court, in refusing to disturb it, said: "The instructions as to the liability of the defendants for the acts of their servant were favorable to the corporation. The only point upon which a doubt might be suggested, would be upon the second clause of the instructions, that if the company authorized the conductor to put out of the car passengers who had not paid their fare, and he put out persons who had paid their fare, the company would not be responsible for his acts. If a passenger, who has paid his fare and conducts himself well, is removed by the servant of the company having charge and control of the train, it is difficult to see how the company could escape responsibility for his act."¹ * It has been held that a railroad company is liable for blows unjustifiably struck by the conductor's assistants in ejecting a person from the train, notwithstanding the blows are struck contrary to the conductor's orders.²

§ 183. The right and duty of railway companies to establish and enforce reasonable regulations for the government

¹ Moore v. Fitchburg R. R. 4 Gray, 465.

² Coleman v. N. Y. & New Haven R. R. Co. 106 Mass. 160.

* In an action against a railway company for an assault, laying as special damage the loss of a pair of race-glasses, which the plaintiff left behind him in a railway carriage when he was forcibly removed therefrom, with a count in trover, it appeared that the plaintiff was traveling with other passengers on a railroad, and that, upon the tickets being collected, there was found to be a ticket short; that the plaintiff was charged by the conductor of the train with not having a ticket, and, on his refusal to pay the fare or leave the carriage, he was put out, without any unnecessary violence, by the officers of the company, although he, in fact, had a ticket. There being no evidence that the glasses had come to the possession of any of the company's servants, it was held that the plaintiff could not recover for their loss (*Glover v. The London & South Western R. R. Co.* 3 L. R. Q. B. 24). Cockburn, C. J.: "The case would be very different, in my judgment, if the glasses had fallen from the plaintiff's person as the immediate result of any violence offered to him. But the jury must be taken to have negatived—and rightly, as it seemed to me—any violence beyond that necessary to remove the plaintiff from the carriage, so that it was not the case of a man being dragged out of a carriage under circumstances which rendered it impossible for him to take the property with him which he had under his own personal protection. * * * No doubt, if he had applied to be allowed to get the glasses, or asked one of the passengers to hand them to him, this would have been done. He has, therefore, only himself to blame that the glasses were left in the carriage, and the loss was not the necessary consequence of the defendant's act, but owing to the plaintiff's own negligence or carelessness. This head of damage is therefore too remote, and the plaintiff cannot recover it."

of their lines, have been frequently recognized by the courts in this country. The safety and security of the traveling public, as well as the interest of the roads themselves, require that such right and duty should exist and be enforced. Upon that ground, it has been held that the company and its servants may not only exclude those who refuse to pay their fare, or to comply with such reasonable regulations as are made for their government, but that they may also rightfully inquire into the habits or motives of those who claim the right of passage.¹*

§ 184. When a person buys a railroad ticket, the ticket implies a contract that he is to be carried in the usual manner in which passengers are carried who have tickets of the same kind, although the purchaser is ignorant of the rules and regulations of the company.² A railroad company had two lines of road between the same points, on the longer of which more was charged than on the other. A person having bought a ticket for the shorter route, took a train on the longer one. The conductor told him that he could only be taken to a certain point by that train, unless he paid additional fare, which refusing to do, he was put off. It was held that the person was lawfully ejected from the train.³ Where the condition of a commutation ticket was that it should be shown to the conductor on every passage, and if not shown the regular fare should be paid, and the holder of the ticket by mistake left it at home, and so told the conductor, and refused to pay the fare, it was held that he was rightfully ejected from the cars.⁴ In a case subsequently tried in the same court, the plaintiff was a commuter on the New York

¹ *Stephen v. Smith*, 29 Vt. 160, per Isham, J., citing *Jencks v. Coleman*, 2 Sumner, 221, and *Com. v. Power*, 7 Metc. 596.

² *Cheney v. The B. & M. R. R. Co.* 11 Metc. 121.

³ *Adwin v. N. Y. & C. R. R. Co.* 60 Barb. 590.

⁴ *Downs v. N. Y. & C. R. R. Co.* 36 Conn. 287.

* The want of instructions in relation to the right of a railroad conductor to remove a passenger from the cars if intoxicated or using profane language, is not the subject of exception, unless the instruction was asked for, and refused at the trial (*Moore v. Fitchburg R. R.* 4 Gray, 465).

and New Haven Railroad, and was known to be such by the conductor; and the latter knew that the plaintiff's ticket was still good. The plaintiff had his ticket when it was demanded, but could not find it, and he so informed the conductor, and refusing to pay the fare, he was ejected from the train. It was held that the plaintiff was entitled to ride as long as there was any reasonable expectation of finding the ticket during the trip; and that if the defendants had the right to eject the plaintiff from the train, they had no right to do it elsewhere than at some regular station.¹

§ 185. When a railroad ticket contains no special condition, but by a rule of the company, such a ticket entitles the holder to ride only on certain trains, of which rule he is uninformed, he cannot lawfully be ejected from a train which he has entered contrary to such rule.² Where, however, the train does not stop at the station for which the passenger has purchased his ticket, though it has on previous occasions sometimes stopped there, and the passenger refuses to pay additional fare to the regular stopping place, he may lawfully be ejected.³

§ 186. A person on a railroad train who unreasonably refuses to pay his fare, may be ejected forthwith without being taken to a regular station.⁴ To require his being put off at some station on the road "would compel railroad companies to carry a passenger to the station next to the one at which he entered the train, which might, and doubtless would often be the very point to which he desired to be taken, and if the passenger were unknown to the conductor, the company would be without remedy."⁵ But in Vermont, the statute⁶ provides that, "If any person shall refuse to pay his fare, or shall be disorderly or drunk, or refuse to comply

¹ *Maples v. N. Y. & New Haven R. R. Co.* 38 Conn. 557.

² *Moroney v. Old Colony &c. R. R. Co.* 106 Mass. 153.

³ *Fink v. Albany &c. R. R. Co.* 4 Lans. 147.

⁴ *McClure v. Phila. &c. R. R. Co.* 34 Md. 532.

⁵ *Ibid.* per Grason, J.

⁶ Ch. 26, § 52.

with all the reasonable regulations of the corporation for the government of the conduct of passengers, it shall be lawful for the conductor of the train, and the servants of the corporation, to put him out of the cars at any usual stopping place the conductor may elect." Although the foregoing statute does not expressly negative the right or forbid the exercise of the power, at any other place on the line of the road, yet by implication it restricts it to some one of the stations or usual stopping places.

§ 187. The right of a railway conductor to expel a person from the cars for the reason that he will not pay his fare when asked to do so, cannot lawfully be exercised in a manner regardless of all circumstances. Where a passenger was carried beyond the place to which he had paid his fare, and put off at a station five miles further on, in consequence of which he was compelled to walk back through the rain, whereby his health was seriously injured, it was held that the company was liable therefor.¹ And where the conductor of a freight train upon leaving the station neglected to ascertain whether there were any passengers on the train who had not procured tickets, and after proceeding a mile and a half to a place where there was no station, ejected a passenger, knowing him to be ill, it was held that a verdict in favor of the passenger for \$1,150 was not excessive.²

§ 188. A railroad company may be made to respond in damages for forcibly ejecting a person from the cars while the train is in motion, notwithstanding such person has no right on the train.³ Where, in an action for injury caused by being forcibly ejected from a railroad car while in motion, it was proved that the conductor ordered the plaintiff to leave the car, and at the same time made such a display of force as to cause him to believe that he would be put off, and that he thereupon jumped from the car, it was held that he

¹ Mobile &c. R. R. Co. v. McArthur, 43 Miss. 180.

² Illinois &c. R. R. Co. v. Sutton, 53 Ill. 397

³ Law v. Illinois &c. R. R. Co. 32 Iowa, 534.

was entitled to recover.¹ In a case in New York² it was proved that the conductor of the defendants' car, without arresting its motion, seized the plaintiff's intestate, and forcibly ejected him. The danger attending such an act was enhanced by other circumstances. It was in the night, and a high bank of snow was thrown upon each side of the track. No injury might have resulted if the expulsion had taken place from the rear instead of the front of the car. As a direct consequence of the conductor's act, the passenger was injured so that he died; and the act itself, under the circumstances, being necessarily attended with great danger, was held to be without legal justification.

§ 189. It is scarcely necessary to observe that one may lawfully resist an attempt to expel him from a railroad train in rapid motion, although he be liable to expulsion. As the refusal of a passenger to pay fare will not excuse a homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him, when such attempt is accompanied with hazard, that he has to resist a direct attempt to take his life.³ So, if he be ejected with unjustifiable violence, he is not bound to give the parties ejecting him notice of a secret infirmity for the purpose of inducing them to lessen the violence; though it might be otherwise, if they were only employing reasonable force to expel him.⁴

§ 190. The special condition which is frequently printed on railroad tickets in reference to the time of their use has given rise to considerable controversy.* Where such cases

¹ Kline v. Central &c. R. R. 39 Cal. 587.

² Sandford v. The Eighth Av. R. R. Co. 23 N. Y. 343.

³ Sandford v. The Eighth Av. R. R. Co. *supra*.

⁴ Coleman v. N. Y. & New Haven R. R. Co. 106 Mass. 160.

* A railroad company is under a legal obligation to permit any persons to get upon their cars, and to transport them to any place they desire to go upon the line of the road, where the train is accustomed to stop, upon the payment of the usual fare, and a compliance with all reasonable and proper rules and regulations established by the company for the safety and convenience of the public and the proper government and management of the road (Harris v. Stevens, 31 Vt. 79; Com. v. Powers, 7 Metc. 596.)

were free from wrongful intention on the part of the passengers, the courts were at first inclined to give to all such exceptions and reservations a liberal construction in favor of public travel. But the later decisions have adopted a more rigid rule.

In an action for assault and battery against a railroad conductor for forcibly ejecting the plaintiff from the cars, it appeared that the plaintiff took a seat in one of the passenger cars on the New York and Erie railroad at Corning for Elmira, and that two or three miles east of Corning he was forcibly put off the train by the conductor and the other defendants, employees on the cars. The only cause alleged for the removal of the plaintiff from the cars was his refusal to pay to the conductor his fare for that trip. It was proved that when the conductor demanded the fare, the plaintiff produced and offered to him a ticket in the words and figures following: "New York and Erie Railroad, Corning to Elmira. Please keep this in sight. Good this trip only. Oct. 19, 1854. No. 46. G. L. Dunlap." The ticket was not mutilated, and the plaintiff told the conductor that his wife had purchased it at the office, and that it had not been used by any one. The conductor refused to receive the ticket, on the ground that it was dated several days previous. The judge before whom the cause was tried, nonsuited the plaintiff, ruling that the ticket was only evidence of the plaintiff's right to ride in the next passenger train going from Corning to Elmira after the purchase of the ticket; or, at all events, that the right was limited to the day on which the ticket bore date, and that the ticket could not be used on a subsequent day. The general term of the Supreme Court, however, held that the ticket *prima facie* was evidence of the plaintiff's right to that passage or trip, and that the conductor had no right to demand fare and refuse the ticket when offered; that, therefore, the plaintiff was put off the train wrongfully, and the action well brought.¹*

¹ Pier v. Finch, 24 Barb. 514; s. c. 29 Ib. 170; Northern R. R. Co. v. Page, 22 Barb. 130.

* In Pier v. Finch, *supra*, the court said: "The case is not embarrassed by

Beebe v. Ayres,¹ was an action against a railroad conductor for forcibly ejecting the plaintiff from the cars. It appeared that the plaintiff purchased a ticket at Newburgh, which entitled him to ride from that place in a passenger car on the New York and Erie Railroad to Addison. The words, "Good this trip only," were on the ticket; it was dated Sept. 16, 1856, and the letters E, D, S, W were on the corners of it. These letters, according to the rules of the company, were to be torn off by the conductors of the train on which the plaintiff should ride as follows: The conductor on the eastern division of the road was to tear off the letter E; the one on the Delaware division was to tear off the letter D; and the one on the Susquehanna division was to tear

any evidence of the custom of the company or of the conductors of the trains, but turns wholly on the construction to be given to the ticket. The possession of the ticket by the plaintiff was *prima facie* evidence that he had paid the regular price for it, and of his right, at some time, to be transported from Corning to Elmira on some passenger train; and as it was unutilized, the presumption is that it had never been used for that purpose. The ticket then in the plaintiff's hands, and on which he claimed the right to ride on that occasion, was evidence of the agreement or undertaking of the corporation to transport him to Elmira on its passenger cars, for a consideration by him paid. And the precise question to be determined is whether upon the face of the ticket, and by its terms, the undertaking was to carry him on any passenger train on which they could conveniently transport him, and which he might choose to take at any time subsequent to the purchase of such ticket; or whether the undertaking was limited to some particular train, or within some definite period of time. It does not appear at what time the ticket was purchased by the plaintiff, though the presumption, I suppose, is that it was purchased at some time on the day on which it bears date, but not at any particular hour of the day. It may have been purchased, for aught we can know or presume, for this purpose before either of the three trains passed eastward on that day, or after they had all passed. The words which are supposed to limit the undertaking to some specific train of cars, or period of time, and the only words which are claimed to have that effect, are 'Good this trip only.' It is quite apparent, I think, that these words have no reference to any particular day or hour whatever. They do not relate to time, but to a journey. * * * When the purchaser commences his trip, and becomes a passenger, the ticket is good for that trip and no other; and at the end of the trip the conductor has the right to demand, and the passenger is bound to surrender, the ticket. The passenger cannot use it for any other trip, and has no longer any right to the possession of it. This construction gives full effect to the language, and works no injury to any one. * * * It will be seen, I think, that 'this trip,' from Corning to Elmira, refers much more naturally and properly to the journey of the plaintiff from one point to the other than to the passage of any particular train of cars over the whole road. It limits the plaintiff's right of passage to the trip which he commences and undertakes to make under the contract, and his right to the possession of the ticket, to the time when it is customary to surrender it according to the usages on that road."

¹ 28 Barb. 275.

off the letter S. The plaintiff, by virtue of the ticket, rode in the afternoon and night of the 16th of September, 1856, upon the railroad as far west as Deposit, on the Delaware division, and, before he arrived there, the conductors on the train on which he rode had torn the letters E and D off of the ticket. He staid at Deposit until the following day, because, as he claimed at the trial, the conductor on the eastern division of the road had told him he could stop there and it would be all right. But he did not have the conductor on the Delaware division indorse anything upon the ticket to show his right to stop at Deposit, as he should have done by the rules of the company. In the forenoon of the next day, the plaintiff rode on an emigrant train, by virtue of the ticket, without objection from the conductor of the train, to Susquehanna, where another conductor took the train. He then rode from that place, on the same train, to Great Bend, but before he arrived there, the conductor who took that train at Susquehanna tore the letter S off the ticket and handed it back to the plaintiff. The plaintiff left the emigrant train at Great Bend, and waited there until the express train came up, and then got upon that. He did this, as he testified upon the trial, because the conductor of the emigrant train told him if he was in a hurry he had better do so. After the express train left Great Bend, the defendant, as conductor, demanded fare of the plaintiff, who presented the ticket to him, with the letter S torn off. The defendant refused to accept the ticket, and told the plaintiff that unless he paid the usual fare to him he should put him off the train; and the plaintiff, refusing to leave the cars or pay the fare, was forcibly ejected. A verdict having been found for the plaintiff, at the circuit, subject to the opinion of the court at general term, it was held that the defendant was entitled to judgment.

It has been recently decided in New York, that a railroad ticket having on its face "Good for this day only," with the date, entitles the holder to ride in the company's cars only on that day, notwithstanding the company's ticket

agent after the ticket is bought, says that it will be good at any time thereafter.¹ And in Maryland it has been held that a person who has bought a through ticket, over connecting railways, has no right to remain over at an intermediate point and afterward take another train and proceed to his original destination, without further payment.²

§ 191. Where it is a rule of a railroad company that passengers soon after starting shall exchange their tickets with the conductor for checks, the law will imply that the contract on the part of the company is to convey persons over their road provided they surrender their tickets to the conductor when demanded, as required by the custom of the road. Under this contract, a person will not be entitled to his passage in the cars without the surrender of his ticket; and his refusal to deliver up his ticket when demanded will justify the conductor in exacting from him his fare in cash, and on his refusal to pay his fare, in putting him out of the cars. The ticket may be regarded as expressing only a part of the agreement entered into between the parties. It does not purport on its face to be a complete agreement. In all such cases, the other parts of the agreement may be proved by parol.³ In *Loring v. Alborn*,⁴ tried in the Court of Common Pleas of Massachusetts, Loring, a passenger in railroad cars on the Boston and Maine railroad, sued Alborn, the conductor of the train, for putting him out of the cars, on his refusing to give up his ticket. It was a rule of the road that passengers must immediately, after the starting of the train, surrender their tickets to the conductor. Mellen, J., before whom the cause was tried, ruled that this regulation of the road was reasonable; and that the plaintiff had no right to retain his ticket until he got near the end of his route, even if he had not previously known of the existence

¹ *Boice v. The Hudson River R. R. Co.* 61 Barb. 611; *Barker v. Coffin*, 31 Ib. 556.

² *McClure v. Phila. &c. R. R. Co.* 34 Md. 542.

³ *The Northern R. R. Co. v. Page*, 22 Barb. 130.

⁴ 4 Cush. 608; 1 Law R. N. S. 461.

of such regulation ; and that on his refusal to give up his ticket, the conductor was justified in ejecting him from the cars. The case was carried to the Supreme Court, and Fletcher, J., in delivering the opinion of the latter court, took no exception to the ruling of Judge Mellen, in relation to the right of the conductor to eject the plaintiff from the cars.

§ 192. The courts have held that the discrimination in fare (by a railroad company) when tickets are purchased at the several stations, or when paid to the conductor in the cars, is reasonable, as affording proper checks upon its accounting officers, and which they have a right to enforce. While the law requires of the company the adoption of such regulations as are necessary for the safety and convenience of passengers in their trains, they have also the right to adopt such reasonable regulations as are necessary for their own security ; and those regulations are to be mutually observed. If they are not complied with by passengers, the company may not only refuse them admission within the cars, but if they are within they may remove them.¹ *Hilliard v. Goold*² was an action against a railway conductor for forcibly ejecting the plaintiff from the train. It was proved that the plaintiff took his seat as a passenger, about seven o'clock in the evening, in the month of January ; that shortly after the starting of the train, the defendant called on the plaintiff for his ticket ; that the plaintiff, not having a ticket, offered thirty-five cents for the fare, and upon the defendant's telling him that the fare was forty cents, the plaintiff refused to pay more than thirty-five ; that the defendant soon afterwards demanded of the plaintiff the same fare, telling him that unless he paid it, he should be obliged to remove him from the car ; and that the plaintiff still refusing to pay the forty cents, the defendant stopped the train, and with the help of the engineer, forcibly put the plaintiff out of the car, and went on, leaving the plaintiff on the track. The judge before whom the cause was tried,

¹ *Stephen v. Smith*, 29 Vt. 160.

² 34 N. Hamp. 230.

charged the jury that the defendant was not justified in ejecting the plaintiff from the car, although he was the conductor of the train, and the plaintiff unreasonably refused to pay the additional fare; and a verdict having been found for the plaintiff, it was set aside for misdirection.*

§ 193. Where the regulations of a railroad company require that passengers shall purchase their tickets before entering the cars, it is obviously the duty of the company to keep their ticket office open until the actual departure of the train, although the train be late. It would seem to follow that if the company close their office prior to that time, passengers who afterward apply for tickets in season to enter the cars with safety, cannot be lawfully charged additional fare; and it has been so decided in New York.¹ But it has been held differently in Connecticut. In *Crocker v. New London &c. R. R. Co.*,² which was an action for forcibly ejecting the plaintiff from a railroad car, it appeared that the defendants were a railroad corporation running regular trains of cars on their road between Norwich and New London; and that they had given public notice of a rule or regulation, that the fare for passengers should be fifty cents, if it was paid and a ticket procured by the passenger before taking his seat in the cars, otherwise it should be fifty-five cents. The plaintiff took a seat in the car without a ticket, and when called upon by the conductor of the train, offered to pay fifty cents, and refused to pay any more. Upon the trial, he claimed to have proved that he went to the office of the company where tickets were usually sold, at a reasonable time before the starting of the train, to procure a ticket, which he was ready to pay for; that he found the office

¹ *Porter v. N. Y. Centr. R. R. Co.* 34 Barb. 353.

² 24 Conn. 249.

* In *Hilliard v. Goold*, *supra*, the Supreme Court, in granting a new trial, said: "We are clearly of opinion that the jury should have been instructed to say, upon all the evidence presented before them, whether the defendant did his duty, under his authority as a conductor under the statute, in ejecting the plaintiff from the cars at the time and place, and in the manner he was shown to have done it. Instead of this, as they were instructed that the plaintiff was entitled to their verdict, as a matter of law, leaving only the amount of damages to be determined by them, the verdict must be set aside."

closed, and that there was no person at the office of whom a ticket could be obtained, at that time, or afterward, until after the departure of the train, and that he informed the conductor of these facts at the time his fare was demanded. The judge charged the jury in substance, that if the facts were as claimed by the plaintiff, he had a right to retain his seat, and the defendants were liable for his removal. But the verdict, which was for the plaintiff, was set aside. *

12. *Right of access to railway depot.*

§ 194. Although the platform of a railroad company, at its station or stopping place, is erected for the accommodation of passengers arriving and departing in the train, yet it is in no sense a public highway. Being unenclosed, persons are allowed the privilege of walking over it for other purposes, but they have no legal right to do so; and the servants of the company after requesting them to leave, can remove them by whatever force may be necessary. Any person who desires to take the cars, has the right to go upon the premises of the company at any station where the trains stop; and the company cannot lawfully prevent or hinder his coming there, or order him to depart therefrom, before the departure of the train.† This right does not depend upon

* In *Crocker v. New Lond. &c. R. R. Co.* *supra*, the court, in granting a new trial, laid down the following propositions: 1. As common carriers merely, the defendants were under no legal obligation to furnish tickets, or to carry passengers for less than fifty-five cents in money, that being agreed to be a reasonable price. 2. The plaintiff's claim to a passage, as if he had a ticket, rested entirely on the assumed engagement of the defendants to furnish tickets, and the plaintiff's endeavor to procure one, defeated by the defendants themselves. 3. The published regulation of the defendants was not a contract, creating a legal debt or duty, but a mere proposal, which might be suspended or withdrawn at pleasure. 4. It was suspended, if not withdrawn, by the closing of the office, and the retirement of the agent. 5. The proposition being suspended or withdrawn, the parties were in the same condition as before it was made. The defendants continuing common carriers, were bound to carry for their reasonable compensation, fifty-five cents, but not otherwise.

† A railroad or steamboat company, by the departure and arrival of their conveyances, give an invitation to all who desire to approach their boats or cars to pass over their wharf or platform; and one accustomed so to pass, cannot be deemed a trespasser in repeating his act after a new station or landing has been adopted, and the cars or boats have ceased to use the old one. To exclude the passer's right so as to make him in fault, notice must have been given of its

the purchase of a ticket, unless the rules of the company require that all persons shall purchase tickets before they enter the cars; the procuring of a ticket only affording evidence of an intent to go upon the train. But it would seem to be but just, inasmuch as the right to remain after request to leave depends upon the intent of the party to take the train, to require of him that on such request being made, if he intends to rely on such right, he should make known his intent to the persons making the request, or show that such persons had knowledge thereof from some other source. The right must not only be exercised in a proper manner, and with a due regard to the just requirements of the company, but it must be exercised within a reasonable time; that is, the person may come upon the premises of the company within a reasonable time next prior to the regular time of departure of the train on which he intends to go, and remain until such train leaves. What is a reasonable time must depend much upon the circumstances of each particular case. The situation of the station with reference to public houses, the distance that the intended traveler resides from the station, and many other considerations should be taken into account in determining the length of time that it would be reasonable for the person to come to the station and remain before the leaving of the train on which he intended to take passage.¹ * *Harris v. Stevens*,² was an action for assault and

changed character, and that the rights of passers are terminated (*R. R. Co. v. Hanning*, 15 Wall. 649).

¹ *Barker v. The Midland R. R. Co.* 18 C. B. 46; *Com. v. Power*, 7 Metc. 596; *Hall v. Power*, 12 Ib. 482; *Gillis v. Penn. R. R. Co.* 59 Penn. St. R. 129.

² 31 Vt. 79.

* The great object for which railroad corporations are created and invested with their extraordinary powers is, that they shall act as carriers of persons and property upon their roads when completed; and by accepting their charters, constructing and putting in operation their roads, they not only take upon themselves all the duties and liabilities incident to the character of common carriers, but they assume other important duties and liabilities. They not only have the right to act as common carriers, but they are bound to act as such. The public have the right to insist that they shall continue so to act. They cannot throw off this responsibility, and absolutely refuse to discharge their duties, except by an abandonment and surrender of their charters. They cannot of their own motion, while acting under their charters, and operating their road, divest themselves of their character of common carriers, and refuse to receive and carry pas-

battery to which the defendant pleaded that he was station agent of a certain railroad company, and that the alleged trespass was committed by him in removing the plaintiff from the premises of the company, where he remained after being told to leave. The plaintiff replied, that at the time of the assault he was at the depot of the company waiting for a train for which he had purchased a ticket. It was insisted on the part of the defendant, as cause of demurrer, that the facts set forth in the replication were not sufficient to justify the plaintiff in remaining on the premises of the company, after he was requested by the defendant to leave, inasmuch that it was not alleged that the plaintiff was there intending to take the then next train of cars upon which he was entitled by his ticket to go, that the said next train was then about to leave, and that the plaintiff was then upon the premises of the company awaiting and expecting the arrival and departure of such train. It was held not necessary for the plaintiff to allege that he entered upon the premises intending to purchase a ticket, or to take the train; for if he entered without that intent, and after his entry formed the intent, his right to remain thereafter would be the same as though it had existed at the time of entry; but that the plaintiff should have averred, that at the time when, &c., he was at the station awaiting the departure of a train that was expected to leave within a short period of time thereafter.

§ 195. The license to enter and remain upon the premises of a railroad company, is revocable as to all except those who have legitimate business there. The right may be forfeited by the improper conduct of the person, or the violation of the rules and regulations of the company. In that case, the company, by their servants, may require him to depart, and on his refusal so to do, they may remove him.¹

§ 196. Where the president of a corporation is the mere

sengers, or refuse to allow them to come upon their premises at the proper place and time, for the purpose of taking passage.

¹ 31 Vt. 79.

conduit for communication between the corporation and its agent, transmitting to the latter the orders of the corporation, as to removing persons from the premises of the corporation who are intruders there, he will not be liable for the abuse of his authority by the agent. But it is otherwise, where it is a personal order emanating from the president.¹

13. *Seduction of daughter with violence.*

§ 197. Where seduction is accompanied with actual violence upon the person of the daughter, or an illegal entry upon the plaintiff's close, or into his house, trespass will lie; and damages for the seduction and loss of service, may be laid as matter of aggravation.² "Although in such actions the injury is to the relative rights of the father or husband, yet as he is not supposed to assent to the act, it is regarded as done forcibly as against him; and for damages sustained by him, trespass *vi et armis* has been considered a proper form of action. Lord Holt is quoted as saying in a case reported by Lord Raymond,³ that a man could not maintain an action against another for assaulting his daughter and getting her with child, unless there had been an unlawful entry into the plaintiff's premises, in which case, the assault upon the daughter, would be an aggravation. But the accuracy of Lord Raymond's recollection of what was said by Holt, was doubted in *Woodward v. Walton*,⁴ and the law held to be otherwise, upon the authority of an earlier case than the one in Raymond. That was *Guy v. Livesey*,⁵ which was an action for assault and battery, in which the plaintiff recovered for a battery inflicted by the defendant upon him, and also for the loss of the service and companionship of his wife, who went with the defendant and lived with him in a suspicious manner;—and *Cholmley's* case cited in the foregoing, where a man brought an action for the battery of his wife, and

¹ *Hewett v. Swift*, 3 Allen, 420.

² *Moran v. Dawes*, 4 Cowen, 412; *Hubbell v. Wheeler*, 2 Aiken, 359.

³ *Russell v. Corne*, 2 Ld. Raym. 1032.

⁴ 1 Bos. & Pul. R. S. 476.

⁵ Cro. Jac. 501; 2 Roll. R. 51.

recovered for the injury to him thereby. A man might therefore bring trespass *vi et armis*, for the seduction of his wife, daughter or servant, or for an assault and battery upon them ; and hence the averment of assaulted, debauched, and carnally knew, in all the forms ; for whether the carnal knowledge was with, or against the will of the wife or daughter, the action was equally maintainable.”¹ In such actions however, the injury to the person of the child, and to the property of the plaintiff, are generally little more than a mere fiction. The direct injury may be waived in all cases, and the declaration framed to meet the consequential injury, disregarding entirely every consideration, except the loss of service, and the more important one of seduction and disgrace.*

§ 198. At common law, for seduction, the woman had no cause of action, the civil action, where carnal knowledge of

¹ Daly, J., in *Koenig v. Nott*, 2 Hilt. 323; s. c. 8 Abb. 384.

* In New York, in *Moran v. Dawes*, *supra*, which was decided previous to the enactment of the statute referred to in the text, § 198, the court said: “A very usual case may be supposed in which, if we are to be governed by the technical rules relating to an action of trespass, the father would be remediless, for the most aggravated form of the injury, unless he has an election. The seducer is received at the dwelling of the father, on the footing of a suitor; he thus having a license to enter the house, of which he avails himself to accomplish the seduction with the consent of the daughter. It could hardly be said that trespass and assault would lie for such an act. The father is then put to his remedy by trespass *quare domum fregit*, laying the seduction, &c., by way of aggravation. The defendant does not become a trespasser *ab initio*; for license was given by the party. The defendant may therefore justify the entry. It is a rule that a trespass itself being justified, this also reaches the matter laid in aggravation; and thus the defendant would be acquitted of the entire charge against him. It cannot be, that the law ever intended to trammel this remedy by imposing upon the party such an absurd result. It marks the limit of the prosecution by confining it to one holding the relation of master; from which it looks directly to the consequential injury as the vital spark of the action.”

In a still earlier case in New York (*Nickleson v. Stryker*, 10 Johns. 115), which was an action of trespass for assaulting and getting with child the daughter of the plaintiff, it was proved that the daughter was twenty-nine years of age, and not in the actual service of her father, when she had the connection with the defendant, and it was held that the plaintiff could not sustain the action; the rule being settled, that if the daughter be of age, she must be in her father's service so as to constitute, in law and in fact, the relation of master and servant, in order to entitle her father to a suit for seducing her. If she be under age, she is presumed to be under his control and protection, whether she reside with him or not (and see *Martin v. Payne*, 9 Johns. 387; *Shufelt v. Rowley*, 4 Cowen, 58).

In Delaware, it has been held that an action *per quod servitium amisit*, may be maintained by a father for a forcible injury to his son (*Hammer v. Pierce*, 5 Harring. 171).

her person was obtained against her will being merged in the felony. In New York, under the statute,¹ a woman upon whom a rape has been committed, may maintain an action for the personal injury; and in stating her cause of action, it is sufficient if her complaint conforms to what is essential in the way of averment in actions for injuries to the person. Accordingly, in an action for assault and battery, an averment in the complaint, that the defendant with force and arms, ill treated the plaintiff and made an indecent assault upon her, and then and there debauched, and carnally knew her, was held, on demurrer, sufficient.²*

14. *Chastisement of pupil by teacher.*

§ 199. A tutor or schoolmaster may lawfully exercise so much of restraint and correction as may be necessary to answer the purposes for which he is employed.³† And when a scholar who is guilty of insubordination and misconduct

¹ 3 N. Y. Rev. Sts. 5th ed., p. 589, § 2.

² Koenig v. Scott, *supra*.

³ 1 Blk. Com. 453.

* In this case, the demurrer was sustained by the judge at special term, upon the assumption that the words "made an indecent assault, and then and there debauched and carnally knew," imported nothing more than the seduction of the plaintiff, for which she could maintain no action. Daly, J., in delivering the opinion of the New York Common Pleas, reversing the judgment of the Special Term, said:—"The doubt in respect to this complaint has arisen, I apprehend from the pleader's employing the form of averment, 'assaulted, debauched, and carnally knew,' which was usual in actions of trespass *vi et armis*, brought by a father for the seduction of his daughter, or by a husband for criminal conversation with his wife. Thus, in *Woodward v. Walton*, 1 Bos. & Pul. N. R. 476, which was an action of trespass, the averment was, that the defendant with force and arms, assaulted, debauched and carnally knew the plaintiff's daughter; and in *Rigaut v. Gallisard*, 7, Mod. 78, the court say, 'If a man find another man in bed with his wife, he may have an assault and battery against him.' Thus, in the forms in Chitty, for an action of trespass *vi et armis*, for criminal conversation, or seducing a daughter, the averment is always, assaulted, debauched, and carnally knew" (2 Chitty's Pl. 856, 6th Am. ed.; and to the same effect, are numerous authorities. *Macfadzen v. Olivant*, 6 East, 387; *Bennett v. Olcott*, 2 Term R. 166; *Bac. Abr. Marriage*, E, 2).

Where a declaration for seducing the plaintiff's daughter, was framed in trespass, but omitted the words "with force and arms," it was held that the objection was cured by verdict (*Parker v. Bailey*, 4 D. & R. 215).

† A music master of a cathedral is not justified in even moderately beating a chorister for singing at a club, although such singing might be injurious to his performing in the cathedral. Evidence of the practice of one cathedral is not admissible in an action against the music master of another, for beating a chorister for singing at a club (*Newman v. Bennett*, 2 Chit. 195).

refuses to leave the school upon being directed by the teacher to do so, a third person may, upon the request of the teacher, use such force as is necessary to remove the scholar.¹ The power of the teacher must be temperately exercised; and no schoolmaster should feel himself at liberty to administer chastisement co-extensively with the parent.² A great, and to some extent irresponsible, power of control and correction is invested in the parent by nature and necessity. It springs from the natural relation of parent and child. It is felt rather as a duty than a power. From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse; for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reason. The schoolmaster has no such natural restraint. Hence, he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise.

§ 200. To justify a schoolmaster in a resort to corporal punishment, the cause must be sufficient, the instrument suitable to the purpose, and the punishment be administered in moderation.³ He must exercise reasonable judgment and discretion in determining when to punish and to what extent. In determining what is a reasonable punishment, various considerations must be regarded,—the nature of the offense, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons much difference prevails as to the

¹ State v. Williams, 27 Vt. 755.

² 1 Blk. Com. 453, n. 12.

³ Cooper v. McJunkin, 4 Ind. 290.

circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion, and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has by being on the spot to know all the circumstances, the manner, look, tone, gestures and language of the offender (which are not always easily described), and thus to form a correct opinion as to the necessity and extent of the punishment, allowance should be made the teacher by way of protecting him in the exercise of his discretion. If, however, the punishment be clearly excessive, the teacher will be liable, although in his own judgment he deemed the punishment necessary and proper. In *Lander v. Seaver*,¹ it was claimed in behalf of the defendant at the trial in the court below, that the schoolmaster was a public officer, that in his government of the school he was invested with public authority, with discretionary powers, and acted in a judicial capacity, and so was not liable for errors of judgment.* The judge charged the jury that "although the punishment inflicted on the plaintiff was excessive in severity and disproportioned to the offense, still, if the master, in administering it, acted with proper motives, in good faith, and, in his judgment, for the best interests of the school, he would not be liable; that a schoolmaster acts in a judicial capacity, and that the infliction of excessive punishment, when prompted by good intentions, and not by malice or wicked motives or an evil mind, was merely an honest error of opinion, and did not make him liable to the pupil for damages." The Supreme Court, however, held that this was not the law. And a similar instruction asked for in Massachusetts was refused, the court telling the jury that if they found that the

¹ 32 Vt. 114; *s. p.* *Hathaway v. Rice*, 19 Vt. 102.

* His authority was likened to that of public officers, such as listers, in the case of *Fuller v. Gould*, 20 Vt. 643; the postmaster-general, in *Kendall v. Stokes*, 3 Howard, 87; the mayor of New York, in *Wilson v. The Mayor &c.* 1 Denio, 595; or a commander in the navy, as in *Wilkes v. Dinsman*, 7 Howard, 89.

punishment was excessive and improper, the master might be found guilty; and the charge was held correct upon the hearing of the defendant's exceptions in the Supreme Court.¹*

§ 201. The supervision and control of the teacher over the scholar continues from the time the pupil leaves home to go to school until he reaches home. Most parents would expect and desire that teachers should take care that their children in going to and returning from school should not loiter, or seek evil company, or frequent places of evil resort. But when the child has returned home, the parental authority is resumed, and the control of the teacher ceases, at least as to all ordinary acts of misbehavior.

§ 202. The right of the teacher to chastise his pupil for what has occurred at the home of the latter, presents a question of extreme delicacy. It certainly ought only to be exercised, if at all, in rare instances, and under exceptional circumstances. The acts done out of the teacher's supervision for which he may punish, must be direct and immediate in their bearing upon the welfare of the school, or the authority of the master and the respect due to him. Cases may readily be supposed which lie very near the line, and it will often be difficult to distinguish between the acts which have such an immediate tendency and those which have not. In *Lander v. Seaver*,² the question presented was as to the right of the master to punish his pupil for acts of misbehavior committed after the school was dismissed and the pupil had returned home. It appeared that the offense for which the boy was whipped was committed at his home, an hour and a half after the school was out; the boy using towards the master, and in his hearing and in the presence of other pupils,

¹ *Com. v. Randall*, 4 Gray, 36.

² 32 Vt. 114.

* In *Com. v. Randall*, *supra*, the court said that if the schoolmaster, in inflicting punishment upon his pupil, went beyond the limit of moderate castigation, and either in its mode or degree committed any unreasonable and disproportionate violence, he was clearly liable for such excess, it then becoming an assault and battery, because purposely inflicted without justification or excuse.

contemptuous language. It was held that where, as in this case, the offense has a direct and immediate tendency to injure the school, and bring the master's authority into contempt, when done in the presence of other scholars and of the master, and with a design to insult him, the master had the right to punish the scholar upon his reappearance at school.

15. *Chastisement of servant by master.*

§ 203. Except in the case of sailors, the master cannot lawfully chastise his hired servant. If he beat his servant, though moderately and by way of correction, it is good ground for the servant's departure, and the servant may support an action against the master for the battery.¹ * *Mathews v. Terry*² was an action against a master for an assault and battery alleged to have been committed by him upon a minor thirteen or fourteen years of age, in his employ in the business of manufacturing clocks. The defendant offered to prove that the plaintiff conducted himself insolently towards him, and refused to obey his lawful commands, whereupon he moderately chastised the plaintiff for such misbehavior. It was urged by the defendant that this power, if not given by the common law, was conferred by the statute relating to masters and servants, which required the proprietors of manufacturing establishments to cause the children employed in such establishments, whether bound by indenture, by parol agreement, or in any other manner, to be taught to read and write, to be instructed in arithmetic, and regularly to attend public worship, and that due attention be paid to the preservation of their public morals. It was held, however, that the proposed evidence was not admissible, no such construction of the statute being warranted. The court remarked that if the children employed were apprentices, they

¹ 1 Chit. Pr. 73, 75; *Newman v. Bennett*, 2 Chit. R. 195.

² 10 Conn. 455.

* Although the hirer of a slave has the same right to punish and correct the slave which the owner himself has, yet if the punishment is cruel, the hirer becomes a trespasser *ab initio* (*Nelson v. Bondurant*, 26 Ala. 341).

were liable to be punished by their masters, to whom they were bound, for their misconduct and disobedience; but that if they were simply hired to labor, as was the case with the plaintiff, and refused to submit to the reasonable and lawful requirements of their employers, they were liable to be dismissed like any other hired servants, but not corporally punished.

16. *Corporal punishment by master of vessel.*

§ 204. Although a captain has a right to inflict corporal punishment upon a seaman under his command, yet it is not an arbitrary and uncontrolled right. He is amenable to the law for the due exercise of it. He ought to be able to show, not only that there was a sufficient cause for chastisement, but that the chastisement itself was reasonable and moderate.¹* Mr. Abbott² lays down the following rule on this subject: "By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relative to the navigation of the ship and the preservation of good order; and in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority in this respect being analogous to that of a parent over a child, or a master over his apprentice or scholar. Such an authority is absolutely necessary to the safety of the ship and of the lives of the persons on board; but it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression."

17. *Abuse by keeper of almshouse.*

§ 205. The keeper of an almshouse has a right, in order to maintain the good conduct of his establishment, and for

¹ Brown v. Howard, 14 Johns. 119.

² Tr. on Shipping, 125.

* The father of a minor child may maintain a libel for the assault and battery of his child at sea. But it will be necessary to prove either actual damage or damage by intendment of law; and the action may be maintained after the child's death, occasioned by the battery (Plummer v. Webb, Ware, 75).

the purpose of restraining its inmates from committing mischief, to use a reasonable amount of preventive force when other means are ineffectual. But he cannot lawfully confine and chain a pauper, although directed to do so by the selectmen of the town, excepting in case of such impending danger from the pauper as to render it necessary. *State v. Hull and Webb*¹ was an information for an assault and battery upon one Foote, a pauper, Hull being the keeper of the paupers of the town, and Webb his hired servant. The question was whether the evidence tended to prove the existence of such an emergency at the time of the wrongs complained of as justified the kind and degree of violence resorted to by the defendants. It appeared that Foote was sitting in a lower room of the house reading. He was in a place where he had a right to be, and had given no provocation. While in this situation, the defendants pushed him up stairs with force, and fastened him in his chamber. Upon being told by him that he could not be confined in this manner, they threw him down, fastened an iron chain around his legs, and locked it with a padlock to a staple driven into the floor. They then went away, locking the door of the room, and leaving him alone,—a man seventy-nine years old chained down as though he had been a wild beast. Evidence was offered that about a year previous to the occurrence complained of the pauper conveyed rum into the house, got drunk, made others drunk, and hid the rum, and that upon an attempt being made to destroy it, he attacked the keeper, and that it was then necessary to chain him; that he was of a turbulent character and temper, not to be restrained by ordinary means; that on several occasions he had been turbulent and unruly, and had been guilty of wanton and destructive acts in the kitchen, and had obstructed the work. As these occurrences had taken place long before the assault charged, had no connection with it, and did not tend to show any such impending danger from

¹ 34 Conn. 132.

the pauper at the time of the assault as made it necessary to confine and chain him, it was held that the proposed evidence was not admissible. And a verdict having been found in the court below against both of the defendants, the Supreme Court refused to disturb it.

18. *Personal violence by husband upon wife.*

§ 206. A man cannot lawfully beat his wife.¹ "Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent."² An action for assault and battery will not, however, lie by a *feme covert* against her husband.^{3 *}

¹ Perry v. Perry, 2 Paige, 501-503; People v. Winters, 2 Park. Cr. Cas. 10.

² Com. v. Thompson, 108 Mass. 461.

³ Longendyke v. Longendyke, 44 Barb. 366.

* In Longendyke v. Longendyke, *supra*, it was conceded that by the rules of the common law husband and wife could not sue each other in a civil action. The only question, therefore, was whether that right had been conferred by statute. Section 7, ch. 90, of the Laws of New York of 1860, declares that married women may sue and be sued in all matters relating to their property which may be their sole and separate property or come to them from any person except their husbands; and may bring actions to recover damages for injuries to their person or character against any person or body corporate, which damages, when so recovered, shall be their sole and separate property. The court said: "The right to sue her husband in an action of assault and battery may, perhaps, be covered under the literal language of this section. But I think such was not the meaning and intent of the Legislature, and such should not be the construction given to the act, for the following, among other reasons: 1. It is contrary not only to the rule of the common law, but to the spirit and intent of the married women's acts, the object of which was to add to her property rights as a *feme sole*, and to distinguish her property from her husband's, and not to confer rights of action upon her against him. 2. It is contrary to the policy of the law, and destructive of that conjugal union and tranquility which it has always been the object of the law to guard and protect. 3. The effect of giving so broad a construction to the act of 1860 might be to involve the husband and wife in perpetual controversy and litigation, to sow the seeds of perpetual discord and broil, to produce the most discordant and conflicting interest of property between them, and to offer a bounty or temptation to the wife to seek encroachment upon her husband's property, which would not only be at war with domestic peace, but deprive her probably of those testamentary dispositions by the husband in her favor which he would otherwise be likely to make. Under the acts of 1848 and 1849, which are quite comprehensive, the courts held that they did not remove the wife's common law disability to contract, otherwise than as respected her separate property. They therefore held her promissory notes and executory contracts invalid, evincing a disposition not to enlarge the acts in question beyond their most plain and obvious scope, nor to remove the disabilities of the common law to any greater extent than was required by the plain words of the statute. The act of 1860 was, doubtless, intended to enlarge this right to make bargains and contracts, and sections 2 and 8 of that

19. *Injury from reckless driving.*

§ 207. Trespass is the proper remedy for injury caused by reckless driving.¹* In an action for driving a wagon with great force and violence against the plaintiff's barouche, in which he was then riding along the public highway, whereby the barouche was broken, and the plaintiff thrown to the ground and injured, the following instruction of the judge before whom the cause was tried was held correct: That the plaintiff would be entitled to recover if the defend-

act would appear to give unqualified power to make bargains and contracts in regard to her property. But if we follow the spirit of previous decisions, it is very doubtful whether they would be held so far to destroy the unity and identity of husband and wife as to enable her to bargain and sell her property to her husband. The act of 1862 (Laws of 1862, ch. 172) does not materially differ from the act of 1860, or require a different construction. It repeals some sections of the act of 1860. It confers the power to sue and be sued in somewhat broader terms than the act of 1860, but not in a manner to lead to the implication that the husband was intended to be permitted to be sued by the wife for injuries to her person and character, as in an action of assault and battery or slander" (referring to *Erwin v. Smaller*, 2 Sand. 340; *Pillow v. Bushnell*, 5 Barb. 156; *Hasbrouck v. Vandervoort*, 4 Sand. 596; *City Bank v. Bangs*, 3 Paige, 36; *People v. Carpenter*, 9 Barb. 580; *Marsh v. Potter*, 30 Ib. 506; *Babbott v. Thomas*, 31 Ib. 277; *Coon v. Brook*, 21 Barb. 546; *Dickerman v. Abrahams*, Ib. 551; *Bass v. Bean*, 16 How. Pr. R. 93; *Arnold v. Ringold*, Ib. 158; *Switzer v. Valentine*, 4 Duer, 96; *Yale v. Dederer*, 18 N. Y. R. 265).

¹ *Waldron v. Hopper*, Coxe, 339; *Rappelyea v. Hulse*, 7 Halst. 257.

* An action for beating the plaintiff's horse attached to a wagon, in which the plaintiff was at the time sitting, is not an action for an assault and battery, but for "injuring property" (*Bull v. Colton*, 22 Barb. 94, *Balcom*, J.). "The plaintiff had the right to waive all damages for the assault upon his person, and bring his action solely for the injury to his horse. His person was not touched, and the damages to his horse were easily separated from any for the supposed assault upon his person. He had his choice between two remedies, and has elected which action he would bring, and such election did not prejudice the defendant. He has lost no right by reason thereof. The recovery in this case, is a bar to any other action the plaintiff may institute for damages arising out of the same transaction." The conductor of a street railroad car, is not the driver, within the statute of New York (N. Y. Rev. Sts. 5th ed. Vol. 2, p. 966, §§ 6, 7), which provides that the owners of carriages running upon the highway for the conveyance of passengers, shall be liable for personal injuries caused by the driver while driving (*Isaacs v. Third Ave. R. R. Co.* 47 N. Y. 122).

The statute above referred to, is as follows:—"The owners of every carriage running or traveling upon any turnpike road, or public highway for the conveyance of passengers, shall be liable jointly and severally to the party injured in all cases, for all injuries and damages done by any person in the employment of such owner or owners as a driver, while driving such carriage, to any person, or to the property of any person; and that, whether the act occasioning such injury or damage be wilful or negligent or otherwise, in the same manner as such driver would be liable. The term 'carriage,' as used in this title, shall be construed to include stage coaches, wagons, carts, sleighs, sleds, and every other carriage or vehicle used for the transportation of persons and of goods, or either of them."

ant, either intentionally or through gross negligence, drove his wagon against the plaintiff's barouche, and thereby over-set it and caused the injury; that the same would be the case if the defendant was guilty of a want of ordinary and reasonable care and prudence, unless there was also fault or negligence on the plaintiff's part, which concurred in producing the injury; and that what occurred previous to the collision, however improper or indiscreet the conduct of the plaintiff might have been, would furnish no justification or excuse for the act of the defendant in subsequently driving his carriage against that of the plaintiff, either through design or negligence.¹

§ 208. A driver who endeavors to keep the road, and prevent others with lighter and more active vehicles from passing, or strives to run them off, or to repass them by unusual and reckless driving, will be liable for the damage thereby occasioned;² and if his conduct has the sanction of his employer, the latter will be liable. The defendant and others hired a job carriage and four post horses, with two postillions, to go to Epsom races. On the road, the drivers, in "cutting in," to the line formed for the purpose of passing through a toll-gate, overturned a gig in which the plaintiff was seated, and severely injured him. After the accident, the defendant, who was on the driver's box, offered money to the injured party, and gave him his card; and upon the owner of the gig afterward calling upon him, the defendant observed that "cutting in" was all fair upon such occasions, and that he "intended if the gig had gone quietly out, to have pulled up to let it in again." It was held that the jury were warranted in inferring that the postillions had acted as they did with the sanction of the defendant, and consequently that he was liable in trespass for the injury done.^{3 *}

¹ Churchill v. Rosebeck, 15 Conn. 359.

² Strohl v. Levan, 39 Penn. St. R. 177.

³ McLaughlin v. Pryor, 4 Scott, N. R. 655; 1 Car. & M. 354; 6 Jur. 374.

* An action of trespass may be maintained against a father for an injury caused by his team in charge of his son, with whom he was riding at the time of

20. *Resisting arrest.*

§ 209. It is the duty of an officer to show his warrant if asked to do so. In New York it has been held that if this is not done the party arrested may resist, and that the officer will be liable for assault and battery and false imprisonment.¹ *Bellows v. Shannon*² was an action for assault and battery on an officer who was attempting to arrest the defendant under a warrant. It appeared that the defendant did not know at the time of the occurrence that a warrant had been issued, and it was held that he was not liable. The court remarked that "to allow an officer to recover damages in such a case would be to permit him to take advantage of his own misconduct. A liberal protection should be awarded to public officers when they act uprightly; but they are entitled to no favor when they designedly act in such a way as to lead third persons into difficulty. When they fall into error in an honest effort to discharge their duty, it is enough that they are allowed to set up their official character as a shield. They should not be permitted to use it as a weapon of assault against one who has been misled by their improper conduct, and who has done nothing more than resort to the law of self-defense."

§ 210. In an action for assault and battery and false imprisonment against an officer, it is competent for the plaintiff to show that he consented to accompany the officer, and that, notwithstanding such consent, he was roughly and brutally treated. This consent would form an important element in the case, and, if sincere, would have required and justified a smaller degree of force than under other circumstances. So, on the other hand, it is competent to show the

the occurrence. "Here the son was driving, and the father, the defendant, was riding. The latter made no objection or endeavor to control his son, and if he did not, it was a presumption which a jury might well make, and which I think they were bound to make, that he assented to what was done in the management of the instrument (the team) which did the injury, and therefore, per consequence, was answerable, provided the result was not an unavoidable accident, which the jury have found was not the case" (*Strohl v. Levan, supra; ante, § 40*).

¹ *Frost v. Thomas*, 24 Wend. 418; see *post*, § 333.

² 2 Hill, 86.

resistance of the plaintiff, in words as well as in acts; and when the plaintiff, besides resisting, said that he would murder any man that attempted to arrest him, it was held that a much greater degree of force was justified than if there had been no such threat.¹*

21. *Aiding or encouraging assault.*

§ 211. The rule to which we have already adverted,² that all persons aiding and abetting or counseling and procuring a trespass, or afterward assenting to it, when done for their benefit, are principals, applies to *femes covert* and minors, who are consequently liable when they procure another to commit an assault and battery. The cases to the contrary relate to civil acts done by the command of persons not having capacity to make contracts; and because such commands are in the nature of a contract, they are void. But trespasses are analagous to crimes, which *femes covert* and minors may be answerable for, although not personally present when committed.³

§ 212. If persons who are present at a quarrel encourage a battery, they assume the consequences of the acts done, to the fullest extent. Often they are more culpable than the active participants. It is not necessary that the encouragement should consist of appeals to the ruffian engaged in committing the battery. It is enough if they encourage and sanction what is being done, and manifest this by demonstrations of resistance to any who might desire to interfere to prevent it; or by words, gestures or acts indicate an approval of what is going on. The law will not weigh very nicely the acts of individuals to ascertain whether what was said or done by them has enhanced the injury more or less than

¹ *Fulton v. Staats*, 41 N. Y. 498.

² *Ante*, § 23.

³ *Sikes v. Johnson*, 16 Mass. 389.

* In *Fulton v. Staats*, *supra*, Lott, J., with whom Grover and Woodruff, JJ., concurred, dissenting, maintained that no declaration, such as it was alleged the plaintiff had made, would justify or palliate any of the acts complained of, especially if not made in the presence of the defendant.

the acts of others. All so engaged are answerable for all the injury.¹ The following instruction was accordingly held correct: "If, in a tumultuous crowd, the defendant saw a person, by him known to be an officer in the discharge of his duty, assaulted, and used words, acts or gestures which might tend to incite or encourage the person then assaulting the officer to assault him, he might be convicted of an assault, notwithstanding he did not in person touch or injure the officer."² Where a carpenter, connected with a train of artillery, but who was not subject to martial law, brought an action for assault and battery against the governor of Gibraltar, and proved that he had been tried by court martial and sentenced to be whipped, and that the governor confirmed the sentence, which was then executed, it was held that the plaintiff was entitled to recover.³ An officer, accompanied by an execution creditor, tried to levy on a mare which the debtor had sold to one Wood. The debtor and Wood resisted the attempt of the officer to take the mare, and in the scuffle Wood jumped on to the mare and rode her away. The officer then directed the creditor to seize the debtor, and hold him while he went after Wood and the mare, which the creditor did. In an action by the debtor against the officer and creditor for assault and battery, it was held that as the execution did not run against the debtor's body, and as he did not interfere or threaten to interfere with the officer's going after the mare, both of the defendants were liable.⁴*

¹ *Frantz v. Lenhart*, 56 Penn. St. 365; *Little v. Tingle*, 26 Ind. 168; *State v. Rawles*, 65 N. C. 334; *ante*, § 23; *post*, § 290.

² *Com. v. Hurley*, 99 Mass. 433.

³ *Cowp.* 175.

⁴ *Francis v. Leach*, 41 Vt. 675.

* The fact that a person was present when an assault and battery was committed, without in any way participating in it, will not make him liable to damages therefor; although he was at a public meeting a short time previous as a selectman of the town, at which meeting a committee was appointed to look after those suspected of being disloyal, in pursuance whereof the plaintiff was visited by the committee, followed by a large crowd of persons, by some of whom the assault and battery was committed in the presence of the selectman, it not appearing that at the meeting any violence was proposed or contemplated (*Miller v. Shaw*, 4 Allen, 500).

A person to be liable as a joint trespasser for an assault and battery committed.

§ 213. Persons whose duty it is to interfere to prevent threatened violence, may make themselves liable for not affording the required protection. The responsibility of the father for the wrongful act of the child committed in his presence, has already been spoken of.¹ In *Avery v. Bulkly*,² which was an action for assault and battery, the defendants were the captain and lieutenant of a company of militia who were marching in order through the country to a general training under the command of the defendants. The trespass was committed by some of the company under such circumstances that the defendants must have known it; and they took no measures to suppress it, or to detect and punish it after it had happened. A verdict having been found for the plaintiff, the Supreme Court refused to disturb it.*

22. *Place of trial.*

§ 214. A state or nation may give its citizens redress for personal injury committed without as well as within its territorial limits, when it obtains the means of exercising jurisdiction over the wrong-doer. This is recognized by the common law. Many if not most of the actions which are brought are transitory and not local; and if the cause upon which any one of them is founded arose in a foreign land, it would be just as tenable as if it arose here. The fact, that the redress is given by statute instead of by the common law makes no difference. A penal law is strictly local. But whether a remedial statute is *extraterritorial*, in reference to the class of injuries for which it proposes to afford redress or compensation, depends, like other statutes, upon the intention of the Legislature, to be gathered from the language employed, the law as it previously existed in relation

in his absence, must be shown to have done something which led directly to the commission of the offense by his cotraveler (*Bird v. Lynn*, 10 B. Mon. 422).

¹ *Ante*, § 40.

² 1 Root, 275.

* A person who sees an affray may forcibly interfere as a peace-maker, unless he uses more violence than is reasonably necessary for the purpose (*Timothy v. Simpson*, 6 C. & P. 500).

to the same subject, the mischief to be prevented, and the remedy to be applied; and every such statute is to be liberally construed.¹

§ 215. In England, it has been held that an action will lie there, for a wrong committed by one English subject against another in a foreign land, if reparation in damages is sought by process against the person of the wrong-doer, or against his property within the jurisdiction of the court.² But it seems that in such case, it must be proved that the act causing the damage, was wrongful by the law of the country in which it was done.³ Where a Captain Gambier tore down sutlers' houses in Nova Scotia, which furnished liquor to his sailors, and afterward inadvertently carried one of the sutlers to England in his ship, and the sutler as soon as he landed prosecuted the captain, it was held that the action would lie.⁴ In New York, it is now settled that the courts will entertain jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States.^{5 *}

§ 216. We have found no case where foreigners have

¹ *Beach v. The Bay State Co.* 27 Barb. 248; s. c. 30 Ib. 433; but see *Vandeventer v. N. Y. & New Haven R. R. Co.* 27 Barb. 244.

² *Scott v. Lord Seymour*, 1 H. & C. 219; 31 L. J. Exch. 457.

³ *Mostyn v. Fabrigas*, Cowp. 161; 1 Smith's L. C. 607; *Dobree v. Napier*, 2 Bing. N. C. 781; *Duke of Brunswick v. King of Hanover*, 6 Beav. 1.

⁴ Cowp. 180.

⁵ *Glen v. Hodges*, 9 Johns. 67; *Johnson v. Dalton*, 1 Cowen, 543; *Smith v. Bull*, 17 Wend. 323; *Lister v. Wright*, 2 Hill, 320; *Mussina v. Belden*, 6 Abb. 165; *Latourette v. Clarke*, 45 Barb. 327; *Dewitt v. Buchanan*, 54 Ib. 31.

* The New York Common Pleas, in *Molony v. Dows*, 8 Abb. Pr. R. 316, held otherwise; but that case is not to be regarded as authority. That decision was probably affected by the necessities of the case, overlooking the second section of the fourth article of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

In New York, except so far as the place of trial of actions for injuries to the person has been regulated by statute, such actions have always been regarded as transitory and triable in any court where the plaintiff may elect to bring his action (*McIvor v. McCabe*, 16 Abb. 319; but see *Chapman v. Wilber*, 6 Hill, 475).

Where the assault and battery is charged to have been committed at M. in the county of H. and within the jurisdiction of the court, it need not be proved to have been committed in the town of M. (*Sturgenegger v. Taylor*, 3 Brevard, 7; *Hurley v. Marsh*, 1 Scam. 329).

been allowed to resort to the English courts to redress their personal wrongs, committed in another country. In *Mostyn v. Fabrigas*,¹ Lord Mansfield put, by way of illustration, the instance of two Frenchmen fighting in France, and expressed a doubt of the jurisdiction of the courts in England in such a case. In New York, however, it has been held that the courts of the State will entertain jurisdiction of an action brought by one foreigner against another, for a personal injury committed abroad. But, as a matter of policy, the court will only exercise such jurisdiction in exceptional cases. Where, therefore, the case was an ordinary one of assault and battery, committed in Canada, both parties still residing there, and the defendant being casually in the State of New York when arrested, the court said they saw nothing in the case to show why jurisdiction should be entertained. It is most clearly against the interests of those living on the border, for our courts to encourage or entertain jurisdiction of such actions. To do so, would establish a practice which might often be attended with serious disadvantage. The true policy is to refuse jurisdiction, in all such cases, unless for special reasons shown.^{2 *}

§ 217. Courts of common law have cognizance of marine trespasses, when it is not a question of prize; it not being the place, but the nature of the issue, that determines the jurisdiction of the court. Whenever the rights of the parties are to be governed by the municipal law, and not by the law of nations, it would seem to follow as a matter of course, that common law courts have jurisdiction of the case. In

¹ Cowp. 161.

² *Dewitt v. Buchanan*, 54 Barb. 31.

* "I have been unable to discover," said James, J., in *Dewitt v. Buchanan*, *supra*, "any principle on which the jurisdiction of the court, in such a case as this, can be denied. But, as a question of policy, there are many reasons why jurisdiction should not be entertained. Unless for special reasons, non-resident foreigners should not be permitted the use of our courts to redress wrongs, or enforce contracts committed or made within their own territory. Our courts are organized and maintained at our own expense, for the use, benefit, and protection of our citizens. Foreigners should not be invited to bring their matters here for litigation. But if a foreigner flee to this country, he may be pursued and prosecuted here."

the act of Congress establishing the judicial courts of the United States, there is a saving to suitors in all cases, of the right of a common law remedy, when the common law is competent to give it.¹ Actions for injuries to the person, have often been maintained in the common law courts of England, against naval as well as military commanders, by their subordinates, for acts done both at home and abroad, under pretence and color of naval and military discipline.² There are also many cases in the books, where actions have been sustained against members of courts martial, naval and military, who have exceeded their authority in the infliction of punishment.^{3*} In an action for assault and battery and false imprisonment, on the high seas, committed by the commander of a vessel in the United States navy, it was held that the courts of New York have jurisdiction of personal wrongs committed by a superior officer of the navy upon a subordinate, while at sea, and engaged in the public service. It was suggested on argument, by the defendant's counsel, that

¹ *Hallett v. Novion*, 14 Johns. 273.

² *Wall v. McNamara*, and *Swinton v. Molloy*, cited, 1 Term R. 536, 537; *Mostyn v. Fabrigas*, Cowp. 161; *Warden v. Bailey*, 4 Taunt. 67; s. c. 4 Maule v. Selw. 400; *Hannaford v. Hunn*, 2 Car. & P. 148.

³ 4 Taunt. 70, 75, and cases cited.

* In the case of *Lieut. Trye v. Sir Chaloner Ogle*, 1 McArthur on Courts Martial, 268, 4th ed., the defendant was president of a court martial which had sentenced the plaintiff to fifteen years' imprisonment; when the only charge against him was, that he required a warrant, in writing, to justify him in taking another officer into his custody, under an arrest, which was considered no offense. The verdict was 1,000*l*. The case became somewhat memorable for a collision between the civil and military courts, and for the firmness and triumph of the former. In the course of the trial of the cause, the judge having remarked that the plaintiff was at liberty to bring his action against any of the members of the court martial, he proceeded against Rear Admiral Mayne and Captain Rentone, who were arrested, by a writ, upon the breaking up of the court martial, where the former presided, and the latter sat as a member. This was much resented by the members of the court martial, who passed resolutions on the subject, reflecting, in intemperate language, on the chief justice of the court, Sir John Willes. The resolutions were laid, by the lords of the admiralty, before the king. But the chief justice, without waiting for the result, caused every member of the court martial to be taken into custody for contempt, when a stop was put to the proceedings by a public written submission, signed by all of the members of the court martial, and transmitted to the chief justice, which, after being read in court, was registered in the Remembrancer's Office—"A memorial," as the chief justice observed, "to the present and future ages, that whoever set themselves up in opposition to the laws, or think themselves above the law, will, in the end, find themselves mistaken."

inasmuch as the defendant was in the service of the United States when the acts complained of were done, the courts of the State, as a matter of comity and policy, should decline to take jurisdiction, within the principle of *Gardner v. Thomas*;¹ but the court thought otherwise.² A similar objection was taken and overruled in *Percival v. Hickey*,³ which was the case of a marine trespass committed by the commander of a British sloop of war, *Spencer*, Ch. J., remarking that the court was not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy.

§ 218. The State courts may take cognizance of torts committed on the high seas, on board of a foreign vessel, where both parties are foreigners. But if jurisdiction could be claimed as matter of right, it would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our own citizens abroad, as well as to foreigners here. It must therefore, on principles of policy, often rest in the sound discretion of the court to afford or withhold jurisdiction, in such cases, according to circumstances.⁴ *

¹ 14 Johns. 134, *post*, § 218, *note*.

² *Wilson v. Mackenzie*, 7 Hill, 95.

³ 18 Johns. 257.

⁴ *Gardner v. Thomas*, 14 Johns. 134.

* To hold that jurisdiction could be claimed, in all cases, as matter of right, would introduce a principle which might oftentimes be attended with manifest disadvantage and serious injury to our own citizens abroad, as well as to foreigners here. Mariners might so annoy the master of a vessel as to break up the voyage, and thus produce great distress and ruin to the owners. In *Gardner v. Thomas*, *supra*, Thomas brought an action against Gardner, in the justices' court of the city of New York, for assault and battery, to which the defendant pleaded that the parties were British subjects, and that the alleged offense was committed on board a British vessel on the high seas. A general demurrer to this plea having been overruled, the court gave judgment for the plaintiff. On error to the Supreme Court, the question presented was whether the courts of the State would take cognizance of a tort committed on the high seas, on board of a foreign vessel, both of the parties being subjects or citizens of the country to which the vessel belonged. The court, in deciding that they might do so, but that in the then case, it was not expedient to exercise such a jurisdiction, said:—"It must be conceded that the law of nations gives complete and entire jurisdiction to the courts of the country to which the vessel belongs, but not exclusively. It is exclusive only as it respects the public injury, but concurrent with the tribunals of other nations as to the private remedy. There may be cases, however, where the refusal to take cognizance of causes for such torts, may be justified by the manifest public inconvenience and injury, which it

23. *Holding to bail.*

§ 219. In New York, in actions for assault and battery, it has been held that some special reason must be shown for holding the defendant to bail; as that he is a transient person residing out of the jurisdiction of the court.¹ But after the defendant has given bail, and put in an answer, it is too late for him to vacate the order directing his arrest.²

24. *Parties to action.*

§ 220. The person upon whom the assault and battery was committed is, in general, the proper party to bring the action. But if the injury has resulted in his death, the action if maintainable, must be brought by his personal representative. When the person assaulted is a servant, and the master has lost the benefit of his labor in consequence of the assault, the action may be brought both by servant and master. The servant is entitled to an action for every trifling battery. In the case of the master, however, he must have sustained damage by losing the services of his servant.³

§ 221. At common law, the husband has no interest in, or title to, damages occasioned by an injury done to the per-

would create, to the community of both nations; and the present is such a case. The facts in this case sufficiently show the impropriety of extending jurisdiction, because it is a suit brought by one of the mariners against the master, both foreigners, for a personal injury, sustained on board of a foreign vessel on the high seas, and lying in port when the action was commenced, and, for aught that appears in the case, intending to return to their own country without delay, other than what the nature of the voyage required. Under such circumstances, it is manifest that correct policy ought to have induced the court below to have refused jurisdiction, so as to prevent the serious consequences which must result from the introduction of a system, with regard to foreign mariners and vessels, destructive to commerce, since it must materially affect the necessary intercourse between nations by which it alone can be maintained. The plaintiff, therefore, ought to have been left to seek redress in the courts of his own country on his return. The judgment, for these reasons, may be deemed to be improvidently rendered in the court below, and is, therefore, reversed."

¹ Zimmerman v. Chrisman, 7 Hill, 153.

² McKenzie v. Hackstaff, 2 E. D. Smith, 75; referring to Chapman v. Snow, 1 B. & P. 132; Jones v. Price, 1 East, 81; Crygier v. Long, 1 Johns. Cas. 393; Lewis v. Truesdale, 3 Sandf. 706.

³ Robert Mary's Case, 9 Co. 205.

son of the wife; though money collected on a judgment for such an injury becomes the property of the husband. If the wife die *pendente lite*, the action abates. If the husband die before action brought, or *pendente lite*, the action survives to the wife.* The injury to the person of the wife, is therefore the meritorious cause of action. In Wisconsin an action under the statute¹ for injury inflicted on a married woman, resulting in her death, must be brought by the executor or administrator.² In New York, the statute³ has changed the common law rights of the husband and wife in respect to torts committed upon the person of the wife, and has made her the sole plaintiff in actions brought for them, and given her the exclusive right to the damages therefor, and has taken from the husband all right to, or control over, the same, in actions brought for such injuries. Damages for assault and battery on the wife, are now made a part of her separate estate, and in respect to them she is as a feme sole.⁴ And an action may be brought by her alone against a wrong-doer, for an injury to her person committed previous to the passage of the statute.⁵† Where an action is brought against a married woman for assault and battery, the husband may be made a

¹ Rev. Sts. ch. 135, §§ 12, 13.

² *Whiton v. Chicago &c. R. R. Co.* 21 Wis. 305.

³ Sts. of 1860, ch. 90; and of 1862, ch. 172.

⁴ *Mann v. Marsh*, 35 Barb. 68; s. c. 21 How. 372.

⁵ *Ball v. Bullard*, 52 Barb. 141.

* At common law, the recovery in such an action, was for the benefit of the husband, and he could bring *scire facias* in his own name upon a judgment recovered in the names of himself and wife. If the money was collected, and came to the hands of the wife, it nevertheless was the property of the husband, and went to his representatives (*Com. Dig. Baron & Feme*, X; *Washburn v. Hale*, 10 Pick. 429; *Southworth agst. Packard*, 7 Mass. 95; *Mann agst. Marsh*, *supra*).

In Pennsylvania, damages for injury to the person of the wife, belong to her (*Jeanes v. Davis*, 3 Penn. L. J. 60).

† The language of the statute referred to in *Ball v. Bullard*, *supra*, is as follows: "Any married woman may bring and maintain an action in her own name, for damages against any person, * * * for any injury to her person, * * * the same as if she were sole, and the money received on the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property."

A husband cannot maintain an action in his own right, for mental suffering caused by injury to his wife (*Hyatt v. Adams*, 16 Mich. 180).

party defendant.¹ In such case, both the husband and the wife are liable; and judgment being against both, the execution must follow it, and direct the collection of damages and costs out of the property of both. The judgment becomes a lien on the real estate of which the husband is owner at the time of its rendition, and on such as he thereafter acquires; and his death will not impair the lien of the judgment, nor the right of the plaintiff to enforce it against the land.² For a joint assault committed by husband and wife, he should be sued alone.³

§ 222. When an assault and battery is committed by A. and B. the acts are distinct; the stroke of A. in fact not being the stroke of B., and *vice versa*. But by operation of law, these distinct acts are amalgamated, and in all their parts, become the united act of both. The cause of action is one and indivisible, and the remedy is joint or several, at the option of the plaintiff.⁴ The action will lie against a corporation, and an individual may be joined as codefendant.⁵

§ 223. Where in an action for assault and battery against three, two of the defendants being non-residents cannot be served, the defendant who is served with process, cannot object that the court has no jurisdiction for the want of service upon the other defendants by a motion for the dismissal of the action. The plaintiff may discontinue as to the defendants not served at any time before the trial, and proceed to a several judgment against the defendant served.^{6*} In

¹ Anderson v. Hill, 53 Barb. 238; N. Y. Code, § 114; *ante*, § 38.

² Flanagan v. Tinen, 53 Barb. 587. ³ Sisco v. Cheeney, Wright R. 9.

⁴ Sheldon v. Kibbe, 3 Conn. 214; *ante*, § 61.

⁵ Brokaw v. N. J. R. R. Co. 3 Vroom, 328.

⁶ McKenzie v. Hackstaff, 2 E. D. Smith, 75.

* In the above case, the court said: "For a trespass of this description, the plaintiff has his election to bring a separate action against one of the trespassers, or to unite them all in one action. I do not see that the action should be defeated as respects the defendant served because he has failed to serve process upon the other defendants, or that he should be compelled, when he has served one of the defendants, to strike out the defendants not served. He may have it in his power to serve the other defendants before the cause is brought to a hearing; and the ends of justice would be served by having but one trial, and by his

Maryland it has been held that where only one of the joint wrong-doers is taken, but the other is afterward brought in on the renewal of the writ, the court upon motion may consolidate the cases, though they stand separately on the docket.¹

25. *Declaration.*

§ 224. Causes of action which are essentially distinct, so that the verdict will not show for which it was rendered, cannot be united. This is not the case of a complaint which charges that the plaintiff was assaulted, dragged through the public streets, detained in the custody of the sheriff, and restrained of his liberty without probable cause, by which he was wounded, injured in credit, and hindered in business.² But a complaint which stated facts constituting a cause of action for an assault and battery, and also a cause of action for slander, both in a single count, and alleged that the plaintiff was greatly injured in her person, and also in her character and feelings, and claimed damages generally, for

obtaining one judgment against all of them. If he fail to serve them no jurisdiction is acquired as to them, nor is the party served in anywise prejudiced. I do not see how he can be affected by their names continuing in the process, or that it is essential to his right that the proceedings should be discontinued as to them."

In *Northrup agst. Brush & Isaacs* (Kirby R. 108), Brush invited the plaintiff into a private room of a coffee house in New Haven, under the pretence of business, and there assaulted him with loaded pistols; and Isaacs came into the room and aided Brush in further assaulting and beating the plaintiff, no other person being present. It was held that this constituted a secret assault within the statute, although committed in a public house and by a plurality of persons. The court said: "Two persons may commit an assault jointly; and if it is out of the presence or view of others, it is a secret assault; and although the person assaulted may proceed against one of them in a common action of trespass, and take the other for a witness, yet he is not obliged to pursue that method. One of them alone may be insufficient to repair the damages; and it may also be unsafe for him to rest on the testimony of a person whose malignity had induced him to join in a secret attack upon his person; and it is for the public peace and safety, that both the assailants should be complained of, that they may be punished *criminaliter*."

Where a railroad conductor unlawfully puts a passenger out of the cars, and an action therefor is brought against the company and the conductor jointly, and a verdict is rendered against the company and in favor of the conductor, the joinder of the defendants is not a ground of exception by the company after verdict (*Moore v. Fitchburg R. R. Corp.* 4 Gray, 465).

¹ *Mitchell v. Smith*, 4 Md. 403.

² *Sheldon v. Lake*, 40 How. Pr. R. 489; 9 Abb. Pr. R. N. S. 306.

the sum of \$2,000, was held bad on demurrer.¹* Under a statute authorizing one or more counts in trespass to be joined with one or more counts of trespass on the case, where all such counts are for the same cause of action, the first count in the declaration was in trespass for forcibly ejecting the plaintiff from the defendant's cars, and beating and kicking him in so doing, he at the time being lawfully therein, as a passenger from New Haven to Middletown. The other counts were in case, and were alleged to be for the same cause of action. But the second count not only alleged an injury to the plaintiff's person, by being carelessly thrust from the defendant's car, but it also alleged that for certain hire and reward, the defendants also undertook to transport safely to said Middletown, the plaintiff's tool chest, and that they so negligently handled and transported said tool chest, that by reason of their negligence and carelessness, they greatly injured the same. It was held that as the allegations in respect to the chest of tools contained everything that was essential to a recovery, both counts could not be for the same cause of action, and that there was therefore a misjoinder of counts.² Where, however, the action was for fraudulently inducing the plaintiff to marry the defendant, and to cohabit with him, and also for assault and battery, it was held that as the causes of action appeared on the face of the complaint, and the defendant had not demurred,

¹ Anderson v. Hill, 53 Barb. 238, overruling Brewer v. Temple, 15 How. Pr. R. 286.

² Havens v. Hartford & New Haven R. R. Co. 26 Conn. 220.

* In Anderson v. Hill, *supra*, the court said: "The causes of action are not separately stated, as required by the Code and every other tolerable system or idea of pleading; but both are intermingled and woven together in a single fabric of manual and vocal tort, causes of action for words and blows thrown into 'hotch pot,' and counted upon in that condition. Nothing is claimed as damages for the injury arising from the battery as such, and nothing for the injury arising from the slander. Neither cause is claimed to have injured separately; but the injury and consequent damages spring from the union of the two wrongs. Should a verdict be rendered in the plaintiff's favor, it must necessarily be a single verdict, and it would not appear, and no one could ascertain, not even the parties themselves, how much the plaintiff had been injured in person, or how much in character, nor what measure of compensation had been awarded for either injury. Surely justice ought not to be so administered, unless the statute imperatively requires it."

he had waived the objection, and could not raise it upon the trial, as the court had jurisdiction, and the complaint stated facts sufficient to constitute a cause of action.¹

§ 225. When one of the causes of action is but an aggravation of the other, such as entering the plaintiff's close, and committing an assault and battery upon him, they may be united.² Where the declaration was for entering the plaintiff's house, taking his goods, and assaulting, terrifying, and imprisoning the wife and daughter of the plaintiff, and the plaintiff entered on the record a release of damages on account of the terrifying and imprisoning, the declaration was held good.³ And where the defendant was charged not merely with forcibly breaking and entering the dwelling-house of the plaintiff, but with an assault and battery, and with other outrages on the person of the plaintiff, as well as with the abuse of his family, and that part of the charge that related to the forcible entry was not sustained, it was held that the plaintiff, notwithstanding, was entitled to recover.⁴

§ 226. It should not be alleged that the assault and battery were committed on different days. A declaration which charged that the defendant on such a day, and on divers other days and times, &c., made an assault on the plaintiff, was deemed bad on special demurrer.⁵ But it has been held that trespass for assault and false imprisonment may be laid *diversis diebus et vicibus*.⁶

§ 227. Allegations or omissions which are merely formal will be disregarded. The name given to the action in the commencement of the declaration is mere surplusage, the substance of the declaration controlling in this respect.⁷ The general rule which governs in deciding on the form of the declaration in all cases, is that it should state the *gravamen*

¹ Blossom v. Barrett, 37 N. Y. 434; N. Y. Code, §§ 144, 147, 148.

² Flinn v. Anders, 9 Ired. 328.

³ Heminway v. Saxton, 3 Mass. 221.

⁴ Sampson v. Henry, 13 Pick. 36.

⁵ English v. Purser, 6 East, 395; 2 Smith, 445; but see *post*, § 252.

⁶ Burgess v. Freelove, 2 B. & P. 425.

⁷ Burdick v. Worrall, 4 Barb. 596.

with sufficient certainty, that the defendant may know what to answer, and that certainty to a common intent is sufficient.* In an action for driving against the plaintiff's chaise, whereby he was thrown out and injured, the declaration need not allege to whom the chaise belonged at the time of the occurrence.¹ It is not necessary to aver that the assault and battery was wilful or malicious.²

26. *Plea.*

§ 228. In an action for assault and battery, a plea of the general issue simply denies the fact of the trespass alleged, and any justification—as that the plaintiff was the

¹ Hopper v. Reeve, 1 Moore, 407; 7 Taunt. 698; and see Howard v. Peete, 2 Chit. 315.

² Andrews v. Stone, 10 Minn. 72.

* Formerly, declarations with a *quod cum* were holden bad, and no judgment could be rendered thereon even after verdict; and the defect was not considered as cured by any of the English statutes of amendment or jeofails. But now a declaration of this description is not bad, even on special demurrer. In Coffin v. Coffin, 2 Mass. 358, a verdict having been found for the plaintiff upon the general issue, the defendant moved in arrest of judgment, on the ground that as the declaration began "*for that whereas*," &c., by way of recital, it was not sufficiently certain and positive. The objection was, however, overruled. The court said: In the action before us, the person and case cannot be misunderstood by the court from the unnecessary use of the word "*whereas*." Its insertion is a mere technical mistake in form, and not a substantial error; and we think that it is mere surplusage, and after verdict shall be rejected. It is not necessary to decide what judgment would have been given, had the defendant demurred specially to this declaration. But as it is a matter of practice, and the negligence or unskilfulness of attorneys may again bring up the question, we are fully satisfied that, as the mistake is merely formal, and not substantial, a general demurrer would not avail the defendant.

In Benson v. Swift, 2 Mass. 50, which was an action for assault and battery, one of the counts in the declaration, after alleging that the defendant beat the plaintiff with a plank, proceeded as follows: "And there afterwards, the said Benjamin continuing his assault last aforesaid, on the body of the said Benson with force and arms, viz., with four parts of two and a half inch rope, did beat," &c. It was objected to this count by the defendant, after a general verdict for the plaintiff, on a motion in arrest of judgment, that it alleged an assault and battery with a *continuando*. The court were, however, unanimous in the opinion that the declaration was good. Sedgwick, J., said: "Although it must be confessed that the words made use of in this count, '*there afterwards*,' are usually inserted to disjoin allegations of material and issuable facts, yet in this case, on a careful perusal, it does appear to me that it may fairly be understood that the story intended to be told by the plaintiff is, that the defendant made an assault, and that during the continuance of that assault he beat the plaintiff, first with a plank and then with a rope. The assault is the same; but one assault is alleged; the beating was a continued injury, and the instruments only different. This seems to me to be the reasonable construction, and not that two distinct and independent injuries are intended to be charged."

first aggressor—must be set up by special plea. Where, therefore, the jury were instructed that if the defendant committed an assault and battery upon the person of the plaintiff, he might, nevertheless, prove in his defense under the general issue, that the plaintiff in fact made the first assault, and was endeavoring to wrest from him an axe, and that the assault and beating complained of in the writ were no greater or other than were necessary on the part of the defendant to resist and defeat the unlawful attempts of the plaintiff, it was held that such a defense was inappropriate under the plea, and that the instructions were, therefore, erroneous.¹ So, likewise, where in an action for driving a cart over the plaintiff, the defendant endeavored to show, under the plea of not guilty, that the plaintiff slipped off of the edge of the pavement just before the defendant's horse and cart, and that the injury occurred without any negligence of the defendant, it was held that this admitted the trespass to have been the act of the defendant, and set up matter of excuse, and that it should therefore have been specially pleaded.² *

§ 229. When the defendant interposes a special plea of justification, he must either state circumstances which excuse

¹ Jewett v. Goodall, 19 N. Hamp. 562; 1 Saund. Pl. & Ev. 95; 1 Selw. N. P. 125; Lair v. Abrams, 5 Blackf. 191.

² Hall v. Fearnley, 3 Gale & D. 10; 12 L. J. N. S. 22; 7 Jur. 61.

* To a declaration charging that the defendant assaulted the plaintiff, imprisoned him, and kept him in prison contrary to law, and against his will, the defendant pleaded that he committed the trespass by leave and license of the plaintiff. On special demurrer, the plea was held bad, as amounting to the general issue, so far as regarded the assault (Christopherson v. Bare, 11 Q. B. 473; 12 Jur. 374; 17 L. J. 109).

Whether the plea was not bad for the same reason as regarded the imprisonment—*quere* (Ib.).

Trespass was brought against three defendants for an assault committed in Bristol. Two of them were constables of Oxford, and had come down and taken the plaintiff at Bristol (thus committing the assault), on suspicion of his having stolen a horse belonging to the other defendant in Oxfordshire. The declaration set out all the trespasses to have been done without reasonable or probable cause. The two constables, having pleaded not guilty, it was held that they might give the special matter in evidence in mitigation of damages to show that there was reasonable and probable cause, but that as they had acted out of their jurisdiction, they were not entitled as constables to give the special matter in evidence under the general issue as a defense (Rowcliffe v. Murray, 1 Car. & M. 513).

the act charged, or show it to be lawful, thereby admitting the act; otherwise, his plea only amounts to the general issue. Mr. Chitty,¹ in support of this rule, states the following case: In trespass for an assault and battery, when the defendant pleaded that he was riding a horse in the king's highway, and that his horse, being frightened, ran away with him, and that the plaintiff was desired to go out of the way and did not, and the horse ran upon the plaintiff against the defendant's will; on demurrer, the plaintiff had judgment, because the defendant had assumed to justify the battery and yet had not confessed that which amounted to a battery by himself. For if the horse ran away against the will of his rider, it could not be said, with any color of reason, to be a battery in the rider; and it was admitted by the court, that if the defendant had pleaded not guilty, this matter might have acquitted him upon evidence.² In *Blood v. Adams*,³ the declaration charged the defendant with making a violent assault upon the plaintiff—that he beat, bruised, and wounded him—and that he forcibly and violently ejected him from a railroad car. The defendant pleaded the general issue and special pleas in justification. The latter began with a traverse of all that was alleged in the declaration, except the ejecting the plaintiff from the cars, and as to that, set up a special justification that the defendant was the conductor of the train, and that the plaintiff was in the cars without a ticket, and that upon being called upon by the defendant to pay his fare, he refused. The pleas then went on to say: "And the said defendant, then and there required of the plaintiff, as he, the said defendant for the cause aforesaid, lawfully might, that he, the said plaintiff, should then and there leave the said train of cars, and be no further carried as a passenger thereby. And thereupon the said plaintiff did, then and there, in pursuance of the said requirement and command of the said conductor, as aforesaid, leave the said

¹ 1 Chitty's Pl. 511.

² *Gibbon v. Pepper*, 2 Salk. 637; s. c. 1 Ld. Raym. 38.

³ 33 Vt. 52.

train of passenger cars, which is the same ejecting, &c." It was held, that as the alleged trespass was not admitted, the pleas in justification were bad, as amounting only to the general issue.

§ 230. *Son assault demesne*, which is a plea averring that the plaintiff first assaulted the defendant, who thereupon necessarily committed the alleged assault in his own defense, confesses the assault, although the allegation is "before the time when," &c.;¹ and so, likewise, although laid before the day of the memorandum of the declaration, and found to have been committed afterward.²

§ 231. If the defendant is compelled, in self-defense, to employ more than moderate force, he must allege it in his plea.³ Where, therefore, the declaration alleged that the defendant assaulted, seized, violently pulled and dragged about, struck and imprisoned the plaintiff, it was held, that a plea which justified the arrest and imprisonment by virtue of legal process, was bad, in not averring that the acts of violence were rendered necessary by the resistance of the plaintiff.⁴ But the defendant need not minutely detail the circumstances under which the plaintiff first assaulted him.⁵

§ 232. A plea which answers the assault, answers also the battery.⁶ Where the declaration stated that the defendant assaulted the plaintiff, and wrenched a stick from his hand, and with the said stick, and with his fists, gave the plaintiff many violent blows, and the defendant pleaded as to assaulting the plaintiff with the stick and his fist *son assault demesne*, it was held, after verdict, that the plea sufficiently justified the battery with the stick, as well as the assault with it.⁷

¹ Wise v. Hodson, 3 Per. & D. 510; 11 Ad. & E. 816; 4 Jur. 553.

² Hay v. Kitchen, 1 Wils. 171.

³ Mellen v. Thompson *et al.*, 32 Vt. 407, referring to Chitty's Precedents, b. 3, 1071.

⁴ Kregar v. Osborn, 7 Blackf. 74.

⁵ Mellen v. Thompson, *supra.*

⁶ Bryan v. Bates, 15 Ill. 87.

⁷ Blunt v. Beaumont, 2 C. M. & R. 412; 4 Dowl. P. C. 219; 5 Tyr. 1100.

§ 233. The plea of *molliter manus imposuit*,* includes justifications of property real or personal, the removal of a person unlawfully upon the premises or in the house of the defendant, arrest under process, &c. Pleas in justification of the moderate correction of an apprentice or pupil are very similar in principle. None of these pleas, in the usual and general form, are a good answer to a declaration alleging extraordinary or aggravated force and violence, for the reason that the right which the defendant sets up, does not primarily authorize, nor its exercise require, anything more than gentle force. The plea only shows a right to use moderate force, while it admits the declaration to be true which charges an immoderate and aggravated use of it. If the plaintiff forcibly resisted the defendant in this exercise of his right, whereby it became necessary, and the defendant became entitled to use more than moderate or gentle force to assert his right, this also, must be set forth in the plea; and when this is done, the plea becomes analogous to the plea of *son assault*, and it is necessary to set forth minutely or particularly the nature and extent of the force used by the plaintiff, to make the plea a sufficient answer to the declaration.¹ Therefore such a plea to justify the turning of the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge against the defendant, for striking the plaintiff repeated blows, and with great force and violence, several times knocking her down.² So likewise where in an action against a schoolmaster for an assault and battery on a scholar, the plea alleged that the plaintiff was insolent, and refused to obey the reasonable commands of the defendant, and that thereupon the defendant moderately chastised him; but averred no acts of the plaintiff which called for excessive

¹ Mellen v. Thompson, 32 Vt. 407.

² Gregory v. Hill, 8 Term R. 299; and see Johnson v. Northwood, 1 Moore, 420; 7 Taunt. 689.

* That the defendant laid hands on the plaintiff gently. *Molliter manus imposuit*, is an answer to the battery (Titley v. Foxall, 2 Ld. Ken. 308).

severity on the part of the defendant; it was held that the plea did not disclose a sufficient justification.¹

§ 234. Under the foregoing rule, a plea of *molliter manus imposuit*, would not be a good answer to a declaration alleging a wounding of the plaintiff. In an early case in Kentucky, where in action for assault and battery and wounding, the plea alleged that the defendants gently laid hands on the plaintiff to arrest him for felony, and inflicted no more injury than was necessary to effect the arrest; it was held that as the plea did not justify the wounding, it was bad.² Subsequently in the same State, where in an action for trespass on land, and for assault and battery and wounding, the defendants pleaded that the plaintiff had caused a tree to fall across a navigable stream down which they were sailing, and that to enable them to proceed, they were obliged to remove the tree; that the plaintiff stood upon it with an ax, threatening to resist the removal, and that they thereupon gently laid hands upon him; it was held that the plea was not sufficient, as it did not justify the wounding.³

§ 235. When in an action for assault and battery the declaration charges several distinct and separate assaults, the defendant's plea must answer all of the trespasses, and show the circumstances leading to each assault, which exonerate him from liability;⁴ and if the several assaults are laid in separate counts, the plea must show distinct occasions upon which the defendant was justified in committing each particular trespass.⁵ Trespass for that the defendant assaulted the plaintiff, and beat, bruised, pushed, dragged and pulled about, kicked, wounded, and ill-treated him, and then knocked down and prostrated him on the deck of a certain vessel, and then hit and struck him numerous blows, &c. Plea,

¹ Hathaway v. Rice, 19 Vt. 102.

² Boles v. Pinkerton, 7 Dana, 453.

³ Brubaker v. Paul, 7 Dana, 428; and see French v. Marstin, 4 Fost. 440.

⁴ M'Curday v. Driscoll, 1 C. & M. 618; Stammers v. Yearsley, 10 Bing. 35; Noden v. Johnson, 16 Q. B. 218; Bush v. Parker, 4 M. & S. 588.

⁵ M'Curday v. Driscoll, *supra*.

as to the assaulting, beating and ill-treating of the plaintiff, justification as captain of a vessel wherein the plaintiff and other persons were passengers, and that the plaintiff made a great noise, disturbance and affray on board, and was then fighting with a certain other person, "then also being a passenger in and on board of the said vessel, and whose name was to the defendant unknown," and was striving to beat and wound the said person; wherefore the defendant, for the preservation of the peace, and to preserve due order and discipline in the vessel, &c., then as such captain, *molliter manus imposuit*. Replication *de injuria*. It was held that the allegation that the defendant knocked down and prostrated the plaintiff on the deck was alleged in the declaration as a distinct assault from the others, and that it was not covered by the justification in the plea, and that consequently, upon proof of such assault, the plaintiff was entitled to damages.¹

§ 236. If the defendant would plead in bar generally, he may commence his plea with such a general reference to the charges contained in the declaration as will necessarily embrace the whole subject of complaint; or he may set down in detail the several alleged acts which he proposes to justify. But in the latter case the justification is usually confined to the acts thus specified. So that if the declaration alleges a mayhem or a wounding and knocking the plaintiff down, and the plea is silent in these particulars, such charges will not, in general, be held to come within the scope of the justification.^{2*} Where therefore, in an action for assaulting, beating and ill-treating the plaintiff, and beating and striking her down with a truncheon, whereby her thigh was

¹ *Noden v. Johnson*, *supra*.

² *Hathaway v. Rice*, 19 Vt. 102.

* The answer set up three separate defenses: First, a denial of the assault and battery; second, that the plaintiff made the first assault, which was repelled by the defendant in self-defense; third, that the defendant was in his own dwelling, and the plaintiff was unlawfully there and refused to leave, and he used sufficient force to put him out, and only such force as was necessary. Held, that these defenses were consistent with each other, both at common law and under the statute of Missouri (*Rhine v. Montgomery*, 50 Mo. 566; referring to *Nelson v. Brodhack*, 44 Ib. 596; *Lansing v. Parker*, 9 How. Pr. 288).

broken, the defendant pleaded, first, not guilty; and secondly, as to assaulting, beating and ill-treating the plaintiff, that the defendant was possessed of a house, and the plaintiff was making a disturbance therein, and the defendant gently laid his hands on her to turn her out;—it was held that the special plea was bad, in not setting up a justification of the striking and wounding.¹ So likewise, where the plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and then imprisoning him, and the plea justified the assaulting, seizing and laying hold of the plaintiff, and pulling and dragging him about; it was held not a sufficient answer to the entire charge in the declaration.² * Where, however, the declaration was for assault, battery and tearing of clothes, and the defendant pleaded not guilty of the said supposed assaults in manner and form as the plaintiff complained, it was held that this included a denial of the battery and tearing of the clothes,

¹ Oakes v. Wood, 2 Mees. & W. 791.

² Bush v. Parker, 4 M. & S. 588; 1 Bing. N. C. 72.

* In an action for an assault, the defendant pleaded that he and twenty-one others were possessed of a close, and were thereon lawfully playing a lawful game at cricket; that the plaintiff came unlawfully on the close, and interrupted the defendant and the twenty-one in playing the lawful game, whereupon the defendant, in his own right and by the authority of the twenty-one, requested him to depart from the close, and desist from disturbing their game, which he refused; whereupon the defendant removed him out of the close. It appeared that the defendant and twenty-one others were playing, but were not otherwise possessed of the field, and that the plaintiff interrupted them by remaining on the ground occupied by the players when requested to leave it. It was held that the facts might have constituted a justification in defense of the lawful game, if so pleaded; but that as the plea justified the trespass in right of the possession of the close, it was not proved (Holmes v. Bagge, 1 El. & B. 782; 22 L. J. N. S. Q. B. 301).

To a declaration of trespass *quare clausum fregit*, containing a count for an assault, the defendant pleaded, among other things, *liberum tenementum* in J. W., and a justification of the trespass on that ground; and that because the plaintiff was "unlawfully in possession," the defendants, as servants of J. W., and by his command, ejected her; and in so doing, because she resisted, committed the assault. The plaintiff replied that she was lawfully possessed, and was lawfully entitled to her possession as against the defendants, with a special traverse that the plaintiff was unlawfully in possession or occupation. It was held, on special demurrer to the replication, that the plea was substantially one of *liberum tenementum*, and therefore bad as attempting to justify an assault (Roberts v. Taylor, 3 Dowl. & L. 1).

as well as the assault.¹ And where, in an action of trespass for assault and battery, the plea commenced in bar to the action generally, and proceeded to allege that before and at the several times in the declaration mentioned, the defendant was a schoolmaster and the plaintiff his scholar; that the plaintiff was then and there guilty of the insolence and disobedience alleged, whereupon the defendant corrected him, &c., it was held that in order to give to this language its obvious and natural import, it should be understood in a plural and distributive sense, as applying to different occasions on which the trespasses were charged, and that it must be taken as a plea to the whole declaration.²

§ 237. When the plaintiff's declaration sets forth a very aggravated assault and battery, and not only charges the defendant with cruelly beating, but also with kicking and choking him, such allegations are not to be regarded merely as matter in aggravation of the assault and battery complained of, and therefore covered and answered by any plea which would be a good answer to a simple charge of that kind, but as substantive allegations of various acts of trespass to the person of the plaintiff; and any plea which admits the whole declaration, and professes to justify all that is charged in it, must contain sufficient to apparently justify the defendant for all that the declaration alleges. But in such cases a plea averring that the plaintiff made the first assault, and justifying the assault and battery in self-defense, is a good answer to the whole declaration. And where the attendant circumstances are mere matters of aggravation of the original trespass, and do not in themselves constitute substantive trespasses, the defendant need only justify the principal act.³ But if he fail to justify the latter, his plea will be insufficient. To a count in trespass charging the defendant with having assaulted the plaintiff on board a ship on the high sea, and forcing and compelling him, then

¹ *Weathrell v. Howard*, 3 Bing. 135; 10 Moore, 502.

² *Hathaway v. Rice*, 19 Vt. 102.

³ *Taylor v. Cole*, 1 H. Bl. 561.

being sick, to stand and remain standing on the deck for the space of one hour, a plea in justification as to the forcing and compelling the plaintiff to stand and remain standing upon the deck was held bad as attempting to justify that which was mere matter of aggravation.¹

§ 238. The plea may be amended as to a substantive defense to the identical transaction charged. In a late case in New York,² after verdict for the plaintiff, a new trial was granted for the refusal of the court to allow the defendant to amend his answer. The proposed amendment was in substance that the assault and battery complained of was a part of the identical transaction for which the defendant had first recovered damages in action for assault and battery against the plaintiff. It was held that as this formed a substantive defense the amendment was a matter of right. But where the proposed amendment relates to a different transaction from that alleged and proved by the plaintiff, it will not be allowed. Therefore, where, in an action for assaulting the plaintiff, the defendants pleaded that the plaintiff was beating a certain boy, whose name was to the defendants unknown; and that the defendants, to prevent his beating the boy, quietly laid their hands upon him. Replication that the boy in the plea mentioned was one B. W., and was and is the lawful son of the plaintiff, of the age of ten years; and that B. W. refused to obey his lawful commands, whereupon the plaintiff moderately chastised him. Rejoinder that the plaintiff at the time when, &c., was beating B. W. with more violence than was proper and reasonable. It was proved on the part of the plaintiff, that just before the defendants interfered with him he had beaten his son B. W., who was ten years old, with a strap, but not immoderately; and it was proved, in behalf of the defendants, that after the plaintiff had beaten his elder son, B. W., he began beating the next younger son, when the defendants laid hold of him.

¹ Griffiths v. Dunnett, 8 Scott N. R. 836.

² Bailey v. Kay, 50 Barb. 110.

It was held that the issue was limited to the question of the excessive beating of B. W., and, as the two boys had both been beaten, the judge at the trial would not allow any amendment as to the name of B. W.¹

27. *Replication.*

§ 239. In trespass to the person, if the defendant has pleaded merely in excuse, and not in justification, the replication *de injuria* or *de son tort demesne* is in general proper if the plea be wholly untrue. But if the plea be true, and the plaintiff did in fact commit what in point of law amounted to the first assault, the plaintiff must reply specially; and it is said that if the defendant's battery was outrageous, or more than was necessary for self-defense, that matter should be so replied;² and the plaintiff should reply any fact upon which he relies to show that the defendant became a trespasser *ab initio*.^{3*} It seems that in New Hampshire, Ver-

¹ Winterburn v. Brooks, 2 Car. & K. 16.

² Great Falls Co. v. Worster, 15 N. Hamp. 412; Dye v. Leatherdale, 3 Wils. 20; Taylor v. Cole, 3 D. & E. 292; 1 H. Blk. 555; Gundry v. Feltham, 1 D. & E. 338; 1 Chitty's Pl. 410, 567, 568.

³ Esty v. Wilmot, 15 Gray, 168, and cases cited.

* In assault, where there is a justification of *molliter manus* to all the counts in the declaration, the plaintiff cannot be admitted to prove excess unless he has new assigned; otherwise where there is a justification pleaded to one count, and the general issue to another. And the words in the plea of *molliter manus* "as was lawful for the cause aforesaid," do not allow the plaintiff to recover on the general replication on the ground of excess in the defendant (Bowen v. Parry, 1 Car. & P. 394).

In an action for assault and battery, *de injuria* is a good replication to a plea stating that J. E. and S. B. were possessed of a close, and that the plaintiff was making a noise, &c.; and the defendants, as the servants of J. E. and S. B., and by their command, requested him to depart, and he refused, whereupon the defendants, as the servants of J. E. & S. B., gently laid hands, &c., and because the plaintiff resisted the defendants, as servants, and by command, &c., a little hurt, &c. (Piggott v. Kemp, 1 C. & M. 197; 3 Tyr. 128).

Where, in an action for an assault, the plaintiff declared that the defendant beat, bruised and wounded him; plea *son assault demesne*, and the plaintiff replied *de injuria sua propria*; and it was proved that the latter being on horseback, got off and held up his stick at the defendant, when the latter struck him; it was held that the plaintiff should have replied specially; and it having been left to the jury whether from the evidence the plaintiff was so far the aggressor as to justify the assault committed on him by the defendant, and they having found in the affirmative, the Court of Common Pleas refused to grant a new trial (Dale v. Wood, 7 Moore, 33).

In trespass for an assault and battery, the replication *de injuria* to a plea that

mont, Massachusetts, Maryland, Indiana, and Illinois the plaintiff may prove that the defendant's battery was excessive without a special replication.¹ This rule is favorable to the plaintiff, as it enables him on the trial to contest both points before the jury, and to recover, if either be found in his favor, instead of being required to hazard his case upon a single point, the result usually obtained by pleading specially. Where, however, the plaintiff, in answering, would justify his own assault, he must new assign the matter of justification.²

§ 240. A replication which does not meet a material ground of justification set up in the plea, will of course be bad. To a declaration for assaulting and seizing the plaintiff, &c., the defendant pleaded that he was lawfully possessed of a dwelling-house, and that the plaintiff was unlawfully therein with force and arms making a noise and disturbance in the said house without the defendant's leave; and defendant thereupon requested him to depart, which he refused to do; whereupon the defendant, in the defense of the possession of his house, &c., *molliter manus*, &c., to remove, and did remove the plaintiff therefrom. Replication, that the said dwelling house was a common inn, and that the plaintiff at the times when, &c., was lawfully therein as a guest consuming liquids there sold by the defendant, which the plaintiff had paid for, and at a reasonable time, wherefore the plaintiff refused to depart when requested, as he lawfully, &c., "and the defend-

the plaintiff was the defendant's apprentice, whom he moderately chastised for improper conduct, does not put in issue the question of the moderation of the chastisement (*Penn v. Ward*, 2 C. M. & R. 338; 4 Dowl. P. C. 215; 1 Gale 189; 5 Tyr. 975).

Where to an action for an assault the defendant justifies in defense of his master, the plaintiff cannot show his assault on the master to have been justifiable on the general replication *de injuria sua propria*, but must new assign (*Webber v. Liversuch*, Peake's Add. Cas. 51).

¹ *Dole v. Erskine*, 35 N. Hamp. 503; *Elliot v. Kilburn*, 2 Vt. 474; *Bartlett v. Churchill*, 24 Ib. 218; *Mellen v. Thompson*, 32 Ib. 407; *Hannen v. Edes*, 15 Mass. 347; *Reece v. Taylor*, 1 Har. 15; *Gaither v. Blowers*, 11 Md. 536; *Fisher v. Bridges*, 4 Blackf. 518; *Philbrick v. Foster*, 4 Ind. 442; *Ayres v. Kelly*, 11 Ill. 17.

² *Elliot v. Kilburn*, *supra*.

ant of his own wrong committed the trespasses in the said plea mentioned, in manner and form as in the declaration alleged." It was held that the replication was bad, because it did not answer the allegation of the plaintiff's misconduct. Lord Denman, C. J., further held that the replication was double, and Earle, J., that it was argumentative.¹ *

§ 241. When the declaration contains but one count, and a justification is pleaded, to which the plaintiff replies *de injuria*, the plaintiff cannot prove any other assault than the one specified in the plea. In such case, the plaintiff, instead of traversing the plea, should new assign.² † So, on the other hand, if there be two counts charging different assaults and batteries, and the defendant in his plea justifies only one of them, and the plaintiff replies *de injuria*, he thereby waives the benefit of one of the counts, and cannot prove an assault and battery different from the one justified.³

¹ Webster v. Watts, 11 Q. B. 311.

² Carpenter v. Crane, 5 Blackf. 119.

³ Berry v. Borden, 7 Blackf. 384.

* Trespass for assault and imprisonment. Plea that the plaintiff was trespassing on the defendants' close. Replication that the defendants had nothing in the close, except under R. N. C.; that before the time when, &c., and before the defendants had anything in the close, R. N. C. demised it from year to year to W. C.; that W. C. permitted the plaintiff to plant a crop of teasles on condition that W. C. should have one-half of the crop and the plaintiff the other, and the plaintiff entered to cut his teasles, when the defendant assaulted him. It was held that the replication was a sufficient answer to the plea, though it did not allege that W. C.'s interest in the land was continuing when the plaintiff entered to cut the teasles (Kingsbury v. Collins, 4 Bing. 202; 12 Moore, 424). Where the declaration alleged that the defendant assaulted the plaintiff "while sitting in his gig," and the replication alleged that the defendant was in his gig, and that the plaintiff gently laid hands on him and put him out, whereupon the defendant assaulted the plaintiff, it was held that this was not a departure; for both allegations, though apparently contradictory, might be true, as they did not necessarily refer to exactly the same point of time (Macfarland v. Dean, 1 Cheves, 64).

† In assault and battery and imprisonment, the defendant justified the whole as master of a ship in which the plaintiff was a sailor and refractory; and the plaintiff replied *de injuria*. It appearing that the defendant improperly knocked the plaintiff down in addition to putting him in irons, it was held that the plaintiff could not recover, and that if he meant to admit that all was proper except the knocking down, and to proceed for that only, he should have new assigned (Gale v. Dalrymple, 1 C. & P. 381; R. & M. 118). In an action for assault and battery, the defendant pleaded *son assault demesne*. The plaintiff replied, 1st, *de injuria*; 2d, *excess*. Upon a motion by the defendant that the second replication be set aside, the court gave the plaintiff leave to select which replication he would retain. The plaintiff declining to make the selection, the motion was granted. Held that there was no error (Reese v. Bolton, 6 Blackf. 185.)

§ 242. If it be alleged that the assault and battery was committed on a specified day, to which the defendant pleads a justification, the plaintiff cannot new assign an assault committed on another day. A declaration stated that the defendant on the 1st of January assaulted the plaintiff, and then seized him and dragged him about, and struck him many blows, by means whereof the plaintiff was greatly hurt. The first plea justified in defense of the possession of a close and a gate, which the plaintiff endeavored forcibly and with a strong hand to break and enter. The second plea justified in defense of the possession of a cow then being in a certain close, and stated that the plaintiff, against the will of the defendant, endeavored to drive the cow away from the close, and to dispossess the defendant of her, and would forcibly have driven away and dispossessed the defendant of the cow, wherefore the defendant resisted the attempt. Replication *de injuria*, and new assignment that the plaintiff brought his action not only for the trespasses mentioned in the pleas, but for that the defendant, on other and different occasions, and with more force than necessary, assaulted and beat the plaintiff. It was held on special demurrer to the replication and new assignment on the ground of duplicity, that the plaintiff was confined to trespasses on one occasion, and could not enlarge the declaration by the new assignment.¹ *

28. *Right to begin.*

§ 243. Where in an action for assault and battery the plea is *son assault demesne*, and the replication *de injuria*, the defendant has the right to begin. But, notwithstanding the defendant be permitted to commence, the plaintiff may still prove the assault and battery charged in the declaration.² †

¹ Walsby v. Oakley, 1 Selw. N. P. 38; *ante*, § 226.

² Young v. Highland, 9 Gratt. 16; *ante*, § 92.

* Held also, that it was not necessary that the pleas should allege a request to desist; and that the second plea was good, though it did not show who was the owner of the close.

† In England, the sixteen judges resolved that the plaintiff should begin at

29. *Burden of proof.*

§ 244. When the defendant obtains the right to open and close, he thereby takes upon himself the burden of proof to justify all he did. Under the plea of *son assault demesne*, with the general replication *de injuria*, &c., the burden of proof is on the defendant, who cannot give evidence in mitigation of damages, nor contradict the averments of aggravated injuries laid in the declaration, but is bound to show that the plaintiff actually committed the first assault, and that what was done on his own part was in the necessary defense of his person.¹

§ 245. Where the ground of recovery is excess of force on the part of the defendant, the burden of proof is on the plaintiff. In an action for assault and battery, the defendant claimed to act in aid of the U. S. marshal, under a warrant for the arrest of the plaintiff, who was alleged to be a fugitive slave. It appeared that the plaintiff was confined by irons after several acts of resistance and attempts to escape; that his clothes were somewhat torn and his person injured; that the injuries complained of were committed on a recapture after one escape, and in efforts to overcome resistance, and to prevent another escape, which the plaintiff was striving to effect. It was held that the burden of proof was on the plaintiff to show that the force was excessive, taking into view all the circumstances.²

30. *The proof must correspond with the pleadings.*

§ 246. Evidence on the part of the plaintiff which substantially sustains the allegations in the declaration, will be sufficient. An averment that A. struck B. will be maintained by proof that A. was present aiding others in striking

the trial in all actions for personal injuries, although the general issue were not pleaded and the affirmative was on the defendant (*Carter v. Jones*, 6 C. & P. 64; 1 M. & Rob. 281).

¹ *Frederick v. Gilbert*, 8 Penn. St. R. 454.

² *Loring v. Aborn*, 4 Cush. 608. See *Hannen v. Edes*, 15 Mass. 347.

him.¹ In an action by a husband and wife for the injury of the latter, in which it was charged that the defendants assaulted and beat, wounded and terrified the wife, and forcibly and unlawfully turned her out of her house, and fastened her out, and prevented her return thereto, it was held that proof that the defendants, knowing that the husband was absent, and that the wife was alone at home, and while she was out in the garden, entered the house, fastened the doors from within, and prevented her gaining an entrance by the window, was sufficient to entitle the plaintiffs to recover without proof of an actual assault.² *

§ 247. Although one of the counts of the declaration which omits the battery is justified, yet, if the assault and battery alleged in another count be proved as laid, the plaintiff will establish a right to recover. Where, therefore, the first count of a declaration stated that the defendant * assaulted and imprisoned the plaintiff, and during such imprisonment struck, pulled and pushed him about, and the defendant pleaded that he arrested the plaintiff under process, and that the latter, whilst in custody, having conducted himself in a violent manner, the defendant, necessarily, and to prevent his escape, struck, &c., it was held that, although the second count of the declaration (which omitted the battery) was justified by proof of the writ, warrant, and arrest under them, the plaintiff, notwithstanding one assault and battery only was proved, was still entitled to judgment upon proving the trespasses as laid in the first count.³

§ 248. If the declaration contain but one count, the plaintiff, after proving one assault, cannot waive that, and proceed to prove other prior or subsequent distinct assaults.⁴

¹ Goetz v. Ambs, 27 Mo. 28.

² Jacobs v. Hoover, 9 Minn. 204.

³ Phillips v. Howgate, 5 B. & A. 220.

⁴ Stante v. Prickett, 1 Camp. 473; Peyton v. Rogers, 4 Mo. 254; English v. Purser, 6 East, 395; Taylor v. Smith, 7 Taunt. 156; Bull. N. P. 86.

* Evidence that a chronic difficulty was aggravated by the assault and battery, is admissible under a declaration charging that sickness and pain were among the sufferings caused thereby (Johnson v. McKee, 27 Mich. 471).

So, likewise, where the declaration contains several counts, embracing several assaults, and the defendant by his plea narrows them all to one assault, and justifies that, and the plaintiff takes issue, he is confined to the assault set forth in the plea.¹ * When, however, the assault consists of a series of acts of violence following one another so as to constitute one continued wrongful act, the various acts of violence may be proved as constituting one continuing trespass.² In *Brown v. Wheeler*,³ which was an action for assault and battery against two persons, it was claimed that after an assault had been committed by one of the defendants, the other defendant came to the house of the plaintiff two hours afterward and made another assault on her. The defendants insisted that as there was but one count in the declaration, and an assault by one of the defendants had been proved, no other evidence could be given of a second assault by the other defendant. The general principle was not denied. But the plaintiff claimed, and offered to prove, that all the assaults complained of took place in one day, between the hours of six o'clock and ten o'clock in the morning, and that all that was done by the defendants was in pursuance of a common object and design. The judge, therefore, admitted the testimony, directing the jury that the plaintiff could, under the allegations in this declaration, prove but one assault, and that only which she had first elected to prove, but that if they found that these transactions were all parts of a plan

¹ *Gale v. Dalrymple*, Ry. & M. 118.

² *Monkton v. Ashly*, 6 Mod. 38; 2 Salk. 638; *Burgess v. Freelove*, 2 B. & P. 425.

³ 18 Conn. 199.

* The rule is the same in actions for false imprisonment. Where a declaration for false imprisonment against A. and B. contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, A., as the plaintiff in that action, and B. as the bailiff; and the plaintiff by a new assignment, admitting the arrest to be lawful, replied that B., with the consent of A., voluntarily released him, and that they afterward imprisoned him for the time mentioned in the first count. It was held, that as the plaintiff had failed in proving the new assignment, by not showing the consent of A., it was not competent for him to prove the same trespass against B. under the other count (*Atkinson v. Matteson*, 2 T. R. 172).

concerted by the defendants to get the plaintiff out of the house, and they conducted in the manner claimed by the plaintiff, then the testimony was proper.*

§ 249. The plea of *son assault demesne*, together with the plea of not guilty, puts the plaintiff upon proof of every material allegation in the declaration.¹ Where however, to a declaration containing one count, the defendant pleads (1.) not guilty, (2.) *son assault demesne*, the plaintiff new assigns, and the defendant pleads not guilty to the new assignment, the plaintiff is not required to prove two trespasses; but only a trespass differing from that justified, and agreeing with that described in the new assignment.²

§ 250. When a series of personal injuries are charged, and there is an attempted justification of all of them; in order to entitle the defendant to a verdict, it is incumbent upon him to prove the material allegations of his plea as to all. Therefore, where the declaration alleged an assault, putting the plaintiff out of a shop, and imprisoning him in custody of a police officer, and the plea was *molliter manus imposuit*, to remove the plaintiff from the defendant's shop, and a justification of the imprisonment, because the plaintiff had assaulted the defendant, and the assault on the defendant was not proved; it was held that although without it, the first part of the plea might be sustained, yet that being a material allegation to maintain the plea as to the imprison-

¹ Cogdell v. Yett, 1 Cold. Tenn. 230.

² West v. Rousseau, 7 Blackf. 450.

* In this case, the Supreme Court said: "Unless we are to suppose that by one assault is meant the first blow given, and nothing more, we do not see what other course could have been taken than was taken upon the trial. If the assault which first took place in the morning was part of a series of acts concerted by these defendants to free the house of this woman, then each was accountable for that, and all other acts then done in pursuance of that object. To say they were distinct assaults because a short interval of time elapsed between the blows, would be to give to the rule an operation which was never intended, and would tend to encourage litigation by dividing up a cause of action. It might as well have been objected that the suit would not lie against both defendants, because both were not there at the same moment, as to say that all the acts which took place in this short interval did not constitute one assault. Whether the injuries constituted one transaction was a question which, under the claim of the parties, was a proper subject for the consideration of the jury."

ment, it was necessary to prove it, to entitle the defendant to a verdict.¹

§ 251. Where the defendant pleads a prior assault by the plaintiff, he will not be allowed to prove such prior assault by the record of conviction of the plaintiff criminally.² "If put in, it would prove nothing as to the excess of force."³ But where there was no evidence against one of several defendants, and it was elicited on the cross-examination of one of their witnesses, that all of them were indicted and convicted for the same assault and battery, it was held sufficient to authorize a verdict against all.⁴ Although matters in defense of the action not set up in the plea cannot be given in evidence,⁵ yet, notwithstanding the defendant has not pleaded a justification, he may extract evidence in mitigation, on the cross-examination of the plaintiff's witnesses.⁶ *

31. *Proof of time.*

§ 252. Where one assault only is charged, the plaintiff is not bound to the precise time stated in the declaration, but may prove an assault on another day;⁷ and under the general issue, proof of an assault and battery, on any day before action brought, is sufficient.⁸

32. *Evidence as to possession.*

§ 253. Proof of the lawful possession of the place where the alleged assault was committed, is often important. If

¹ *Reece v. Taylor*, 4 Nev. & M. 470; see *Timothy v. Simpson*, 1 C. M. & R. 757; 6 Car. & P. 499.

² *Robinson v. Wilson*, 22 Vt. 35.

³ *Ibid.* per Bennett, J.

⁴ *Wolff v. Cohen*, 8 Rich. S. C. 144.

⁵ *Pier v. Finch*, 29 Barb. 170.

⁶ *Moore v. Adam*, 2 Chit. 198.

⁷ *Cheasley v. Barnes*, 10 East, 80; *Polkinhorn v. Wright*, 8 Q. B. 197.

⁸ *Sellers v. Zimmerman*, 18 Md. 255; *Palmer v. Skillinger*, 5 Harring. 234. See *ante*, § 73.

* In an action against two, for breaking the plaintiff's close and beating his slaves, they cannot, under the plea of not guilty, prove in mitigation of damages, a license from the plaintiff to one of them to visit his negro quarters, and whip any of his slaves acting improperly; the battery being committed by the other defendant, and it not being proved that the slaves beaten had acted improperly (*Brown v. May*, 1 Munf. 288).

the plaintiff was in the rightful and peaceful occupation of it, that would give character to the transaction; and the same may be said with regard to the defendant.¹ In *Collier v. Moulton*,² the question arising out of the bill of exceptions in the court below was, whether the testimony offered by the defendant to show he had a right to enter and occupy the room in the house of the plaintiff, where the assault and battery was committed, was improperly excluded. The defendant pleaded the general issue, and gave notice of *son assault demesne*. On the trial the plaintiff proved that he ordered the defendant out of his house, and, on his refusing to go, gently laid his hands upon him to remove him, and that the defendant resisted and struck him. The defendant then offered to prove that at the time of the occurrence the plaintiff was not in possession of the room; that it was a ball-room that had been hired by several persons for a ball; and that the defendant, at their invitation, went there to attend the ball, and continued there until the plaintiff attempted to turn him out. This offer of the defendant being overruled, the judgment was set aside on that account.*

§ 254. The question sometimes arises as to what constitutes proof of possession. Assault by a master on his servant. Justification of *molliter manus* to remove him from a house of which the master was possessed. Held that evidence that another servant of the defendant had the key to

¹ *Brown v. Wheeler*, 18 Conn. 199.

² 7 Johns. 199.

* In the above mentioned case the Supreme Court said: "This evidence ought to have been admitted. No possible objection could lie to its being received in mitigation of damages; but it would have been proper to rebut the *molliter manus* set up by the plaintiff. The case does not fall within the rule in actions of trespass, that a license to enter cannot be given in evidence under the general issue. *Son assault* is a plea of justification, charging the plaintiff with having committed the first assault; and proving that fact would exonerate the defendant unless the resistance was carried further than the necessity of the case required. If the defendant had pleaded *son assault* instead of giving notice of it under the general issue, and the plaintiff intended to avail himself of the *molliter manus*, he must have replied specially. *Son assault* being set up by way of notice under the plea, the plaintiff had no opportunity of replying, and must necessarily, under such pleadings, be allowed on the trial to give evidence of *molliter manus*. And if so, the defendant ought to be admitted to meet and rebut this evidence by showing that the plaintiff had no right to remove him from the house.

let himself in to work, nobody living in the house, was sufficient proof of the defendant's possession to support the plea.¹ But where the defendant justified on the ground that he was possessed of a dwelling-house, into which the plaintiff unlawfully entered, and was making a noise and disturbance therein, it was held that this plea was not supported by proof that the defendant held two rooms in the house in question, and that the plaintiff, who was landlord of the house, and kept the key of the outer door, had unlawfully come into them, and made the disturbance complained of.² By agreement between A., the owner of a close, and the members of a committee of a cricket club, A. agreed to let to the committee, and the committee to hire the close, to be used as a cricket ground by the club, and for that purpose only. The plaintiff and defendant were members of the committee. The plaintiff having sued the defendant for an assault in removing the plaintiff from the close, the defendant pleaded possession of the close in himself, and justified the removal. The plaintiff replied that he and the defendant were jointly possessed. It was held that the facts supported this replication.³ *

§ 255. Possession may be inferred from circumstances. In an action for assault and battery occurring in a dispute as to which party was entitled to the possession of certain land, the judge at the circuit excluded evidence offered to show who planted, fenced and occupied the lot in question for two years immediately previous to the assault, and a verdict having been found for the plaintiff, a new trial was granted on this ground. The court remarked that it belonged to that class of facts, of which there are many in the law, seemingly involving, to some extent, the expression of an opinion, or a conclusion from other particular facts, as to

¹ Hall v. Davis, 2 Car. & P. 33.

² Monks v. Dykes, 4 Mees. & W. 567.

³ Holmes v. Bagge, 1 El. & B. 782; 22 L. J. N. S. Q. B. 301.

* It is no excuse that the defendant owned the house in which the assault and battery was committed, the house being at the time in the possession of a third person (Suggs v. Anderson, 12 Geo. R. 461).

which from the necessity of the case the law tolerates a direct and comprehensive inquiry.¹

§ 256. A judgment determining the question of possession between the same parties in another matter, in relation to the same transaction, would be conclusive. Where, therefore, in an action by B. against A. for an assault and battery, it appeared that the act complained of occurred while A. was defending his premises against the forcible entry and detainer of B., and was a part of that transaction; it was held that a judgment in favor of A., on the complaint of forcible entry and detainer against B., was admissible, under the general issue with notice, to prove that A. was in lawful possession of the land at the time of the assault, and to disprove the possession claimed by B., and that upon this point, the judgment was conclusive.²

§ 257. Force and fraud may be a proper subject for consideration on the hearing of a *habeas corpus* relative to the possession of a child, where the question is one of discretion, and where the further question is whether the father is the proper person to have the care of it. But in an action at law turning on the strict legal rights of the parties, the manner in which the possession was obtained is not material unless upon a question of damages; for it can affect no rights. Where, therefore, in an action for an assault and battery, it appeared that the plaintiff, the father of a legitimate child, was in the quiet custody of the child when assaulted by the defendant for the purpose of taking it away from him, it was held that if the possession of the father, when obtained, was lawful and exclusive, the fact that the father had regained the possession by strategem, was wholly immaterial.³

¹ Hardenburgh v. Crary, 50 Barb. 32; Parsons v. Brown, 15 Barb. 590; Burt v. Powis, 16 How. Pr. R. 289.

² Bell v. Raymond, 18 Conn. 91.

³ Johnson v. Terry, 34 Conn. 259.

33. *Proof of malice.*

§ 258. Ill feeling or animosity on the part of the person charged, toward the one assaulted, may be proper evidence. When an assault is proved to have been committed by some one, and the person charged is shown to have had an opportunity to commit it, it can scarcely be regarded as an immaterial circumstance for the consideration of the jury, with the view of connecting him with the act, that he was maliciously disposed toward the person assaulted. The existence of ill feeling of itself proves nothing; but it is a circumstance in connection with others that the jury may rightly consider in inferring the alleged fact.¹ In an action for assault and battery, it appeared that the plaintiff was injured whilst the defendant was alone with her. The circumstances proved warranted the inference that the defendant seized and wrenched her arm. But he was her brother, and it was neither impossible, nor very improbable, that the injury was accidental or unintentional. Such an hypothesis would sooner be indulged than that a brother, without any ill-will toward her, had intentionally inflicted violence on her person. But by adding to the circumstances the fact that there existed ill feeling on the part of the defendant toward the plaintiff, the case assumed a different aspect. Whereas, before, the jury might have been bewildered by the absence of a motive to do an intentional wrong, now it was made to appear. The ill-will did not tend to prove the act of seizure of the arm, but it aided to determine its character and legal effect.² *

¹ Jewett v. Banning, 21 N. Y. 27; Klein v. Thompson, 19 Ohio St. R. 569; Augler v. Smith, 34 Ill. 534.

² Jewett v. Banning, *supra*.

* Proof of violence by a third person is admissible when it appears that such person was co-operating with the defendant. Millen v. Sweitzer, 22 Mich. 391. In an action for assault and battery the plaintiff's daughter testified that she was standing a little east and back of the plaintiff's house, some twenty-five or thirty rods from where the affray took place, and that she started and ran through the house toward the other door. She was asked by the plaintiff's counsel what made her go into the house, and if there was anything in the appearance or conduct of the defendant which caused her to do so. It was held that the question was irrelevant (McConaghy v. McMullen, 27 Wis. 73).

§ 259. Words employed by the defendant at the time of the assault and battery are admissible as part of the *res gestæ* and to characterize his conduct as to malice;¹ as that he charged the plaintiff with having sworn falsely.² Where the defendant undertakes to show that he committed the assault without malice, the plaintiff may prove that the defendant has offered to fight him since the commencement of the action.³ And what occurred before or after the principal transaction may be given in evidence to show a malignant and cruel disposition toward the plaintiff.⁴ In *Devine v. Rand*,⁵ the plaintiff charged the defendant with beating, kicking, and in other ways abusing her. To some of the counts of the declaration the defendant pleaded the general issue, and to others in justification, that the force he used was but reasonable chastisement of the plaintiff for her misbehavior, and was administered for that purpose, she being a child between eleven and twelve years old, whom he had received from her parents to bring up. Several distinct successive acts upon different occasions were complained of, and at the trial of the cause in the county court, the plaintiff was allowed to prove acts and words of the defendant about the time of, and between the principal transactions, as follows:—That between the principal acts of abuse and shortly after some of them, the defendant held the child to a mirror and called her attention to her sunken eyes and emaciated condition, and reminded her that he would soon see her stretched on a board; that he besmeared her with excrement, compelled her to drink urine, chained her to the stove, and left her in that condition for hours alone, dressed her in men's clothes, and then pinched, tortured and insulted her; and that the defendant, after putting the plaintiff naked through the ice into a trough of water, conducted her to the house, and before

¹ *McDougall v. Maguire*, 35 Cal. 274; *Blake v. Damon*, 103 Mass. 199; *ante* §§ 3, 145.

² *Pulver v. Harris*, 61 Barb. 78.

³ *Mills v. Carpenter*, 10 Ired. 298.

⁴ *Pierce v. Hoffman*, 24 Vt. 527; *Long v. Chubb*, 5 C. & P. 55.

⁵ 38 Vt. 621.

allowing her to dress placed her over a stove, and as she trembled, whipped her and compelled her to stand there till she fell. It was held that the foregoing was admissible, as calculated to show that the defendant's intention and disposition in the principal acts were wilfully malignant, and that the principal acts were prompted by a settled and persistent purpose of oppression and wanton cruelty. The court remarked that although what occurred after the plaintiff returned to the house was not alleged in the declaration, yet as it took place in connection with the immersion, and very probably in consequence of it, and before the defendant left her or allowed her to dress, it must be regarded as one transaction, and might be proved.*

34. *Admissions and declarations.*

§ 260. Declarations of the plaintiff at the time of the assault, or shortly after, as to the extent of his injuries,—as what he said in relation thereto to the attending surgeon,—are admissible as a part of the *res gestæ*;¹ † and the plaintiff

¹ Green v. Bedell, 48 N. Hamp. 546; Fort v. Brown, 46 Barb. 366; Caldwell v. Murphy, 11 N. Y. 416; Brown v. N. Y. Centr. R. R. Co. 32 Ib. 597; 1 Greenl. Ev. § 102.

* In an action for assault and battery, it appeared that the defendant, with others, used threatening and violent language toward the plaintiff; that the plaintiff soon after left the State, and that while away his house and outhouses were destroyed. It was held that the court erred in admitting evidence as to the plaintiff's absence from the State and the subsequent destruction of the property, unless shown to have been part of the original trespass and that the defendant was present aiding and abetting therein (Williams v. Gaines, 3 Cold. Tenn. R. 240). On a trial for an assault and battery, it is not proper for the plaintiff to ask a witness if, in his opinion, the fight would have taken place if the defendant had informed the plaintiff that he had a knife (Reese v. Bolton, 6 Blackf. 185). Upon the question of excessive punishment of a pupil by the master, proof of the general mild and moderate management of the master is not admissible. But when the proof tends to show that the master acted maliciously or wantonly from an evil heart, and the plaintiff claims to recover damages on that ground, such evidence is proper. It should, however, be strictly limited to that purpose. Upon the question of malice in whipping his pupil with a rawhide, in order to show that he did not resort to an unusual instrument of punishment, it may be proved that a rawhide was used in other schools in the vicinity. Testimony to show that the plaintiff did not claim an excess of punishment on the first trial is proper, as tending to prove that such a claim on the then pending trial is not well founded (Lander v. Seaver, 32 Vt. 114).

† The ground of the admissibility of the evidence was stated by Welles, J., in Fort v. Brown, *supra*, thus: "The witness did not know or profess to know

may prove that he complained of the injury soon after it was received, and continuously afterward.¹ In an action for assault and battery committed on a boy of fourteen, by kicking him, it was proved that the immediate effect of the violence was to produce a pain in the plaintiff's side; that soon after he was kicked by the defendant he came from the barn where he received the injury to the defendant's house, and as he went walked lame, and held his side, and upon being asked what was the matter, answered that the pain was in his side; that soon after, the plaintiff left the defendant's house to go to his father's, and as he walked away, held his side and talked as if he were crying; that on his way home he passed the house of a witness, and was crying and holding his right side; that the next day he went to one C.'s to work, and remained there two months, and while there slept with one G.; that during the entire two months the plaintiff in the night time complained of his right side, and said that he lay on his left side because it hurt him to lie on his right side. It was held that this testimony was properly admitted.² But in an action for injuries inflicted on the plaintiff's wife, which caused her death, it was held that a statement made to the plaintiff by his wife the next day after the assault, was not admissible as part of the *res gestæ*, though it might have been if made immediately after the occurrence.³

§ 261. The declaration of a party prior to the commission of a wrong, that he intends to perpetrate it, is evidence

in what manner or by what means the injury happened to the plaintiff, and therefore had to rely principally upon her statements on that subject. It was for the jury to say whether those statements were true, and if they should believe them the testimony of the physician as to the effect would be applicable. If they did not believe them, they would dismiss his evidence from their consideration. It was not to prove the facts in relation to the assault and battery that the doctor was examined; and none of the questions put to him, nor his answers thereto, appear to have had any such object or tendency."

¹ Yost v. Ditch, 5 Blackf. 184; Johnson v. McKee, 27 Mich. 471.

² Weekly v. Persons, 28 N. Y. 344; and see Aveson v. Kinnaid, 6 East, 188; Gray v. Young, Harper, 38; Caldwell v. Murphy, 1 Kern. 416.

³ Spartz v. Lyons, 55 Barb. 476, Brady, J., *dissenting*; see Goodwin v. Harrison, 1 Root, 80.

against him, because it is presumed that the feelings and purposes which such declaration indicates do in fact exist, and impel such utterance, and because a state of feeling once proved to exist is presumed to continue until some change is shown. The length of time that may have elapsed between the declaration of the purpose and its consummation, as well as all the circumstances attending such declaration, are to be taken into consideration in determining its weight and importance; and the intervening time may be so great, or the other circumstances of such a character, as to render the declaration of little value. But, upon principle, the declaration of an intention to commit the act in question can never be rejected as irrelevant when the issue is whether the party making such declaration did the act.¹*

¹ Bartram v. Stone, 31 Conn. 159.

* In an action for assault and battery, the following instruction was held unobjectionable: that "if the defendant threatened to whip the plaintiff out of the county, and the plaintiff was afterward whipped, it would, in the absence of exculpatory evidence, be a strong presumption against the defendant; but if he had only expressed the opinion that the plaintiff ought to be whipped out of the county, it would not be so strong a circumstance" (Grisby v. Moffat, 2 Humph. 487). In an action of assault and battery, which was tried upon the general issue, the plaintiff offered, and the court received, evidence to prove that previous to the trespass complained of the defendant had threatened the assault. These threats were not made in the plaintiff's presence, and there was no proof that he had been informed of them when the assault was made. The defendant objected to the evidence, because the threats being made before the trespass, and not in the presence of the plaintiff, were no part of the transaction for which the suit was brought. The ruling of the judge, before whom the cause was tried, was, however, affirmed by the Supreme Court, which said: "Evidence of threats is not objectionable because the threats were uttered before the commission of the threatened act. No action can be maintained for their utterance alone. Nor should damages be increased either because they were uttered, or because the party then entertained the malicious motive which inspired them. Evidence of their utterance is admissible only because it conduces to prove a fact—that the malicious motive then existed; and from that fact the inference may be deduced that the same malicious motive continued to exist until the threatened deed was perpetrated. This evidence then was properly received, because it conduces to prove a fact from which a legitimate inference was fairly deducible, that the defendant committed the assault, and that it was premeditated and malicious. It is contended that the evidence was inadmissible because the threats were no part of the transaction on account of which the suit was instituted. But the malice which their utterance indicated was part of the transaction; it characterized the attack, and impelled the blows; and the existence of that malice was one of the facts which the evidence was received to prove. And if the defendant, in mitigation, may show that the act proceeded from a sudden heat, induced by the plaintiff's provocations, why may not the plaintiff, in aggravation, show that it proceeded from long cherished and premeditated malice? The fact that the threats proved never came to the plaintiff's knowledge before the assault, is of

§ 262. The declarations or admissions of the party which accompany the act, as well as his subsequent admissions or declarations, may be proved.¹ And the record of an indictment for the same offense to which the defendant pleaded guilty, may be given in evidence.² The silence of the defendant when charged with the commission of the assault at the time of its alleged occurrence, may be tantamount to an admission of it by him. In an action for an assault upon the person of a Mrs. Stratton, the following evidence offered by the plaintiff, was held admissible:—That just at the commencement of the evening the defendant entered, uninvited, into the bed-room of Mrs. Stratton where she was tending her child; that under pretence that he wanted a newspaper, he induced her daughter to leave the room and go below for a light; that soon after Mrs. Stratton exclaimed “let go of me”—“keep your hands off of me,”—“keep your distance,” to which the defendant made no reply, but as the daughter was just then coming in with a light, he left the house.³*

§ 263. If a party in a given interview and conversation,

no importance. The issue upon trial involved the consideration of the defendant's state of mind at the time of the assault. But his state of mind anterior to that time might be proved as a fact, because from that fact the jury would be authorized to infer what it was when the assault was made. The plaintiff's ignorance of that fact, and of the threats by which the existence of that fact was indicated, was therefore unimportant, because it could have no effect either upon the reality of the existence of the fact itself, or upon the legitimacy and force of the inference which such fact authorized” (*Bartram v. Stone*, *supra*; and see *St. Peter's Church v. Beach*, 26 Conn. 355; *Dibble v. Morris*, *Ib.* 416).

¹ *Sherley v. Billings*, 8 Bush, Ky. 147.

² *Corwin v. Walton*, 18 Mo. 71; *Green v. Bedell*, 48 N. Hamp. 546.

³ *Stratton v. Nichols*, 20 Conn. 327.

*In an action for an assault and battery, the hand of the plaintiff was shown to the jury without objection, in connection with testimony tending to prove that it had been injured in the affray. Testimony was afterward introduced by the defendant to prove that the wound in the hand had existed years before. It was held that instruction to the jury, that if they believed that the plaintiff attempted to deceive them in this particular, they might take it into consideration in connection with the other conflicting testimony in the case, did not declare any legal rule controlling the judgment of the jury, and was, therefore, not objectionable. The court remarked that the jury were left free to allow it to have such an influence as they should think reasonable and just; that it was rather a commentary on the testimony called forth by the position in which the plaintiff had chosen to place himself, than a statement of any rule or presumption of law; and that it was much less severe than the rule which the law applied to the testimony of a witness thus situated (*Millay v. Millay*, 18 Maine, 387).

is repeatedly charged with the commission of assault and battery, and he denies it unequivocally once, he is not called upon to repeat the denial in order to avoid the inference of an admission of its truth against him. But if the charge be made at distinct times, under different circumstances, and in the presence of different persons, though he may have denied it at one time, his silence under accusation at another time, and under other circumstances, is a proper circumstance to be weighed by the jury. At least, the court is not called upon to instruct the jury, as matter of law, that they are to infer nothing against him from his silence. In an action for an assault and battery, it appeared that the plaintiff's arm was considerably injured, which she claimed was done by the defendant violently seizing and wrenching it. There was no direct evidence that the injury was occasioned by the defendant. A witness for the plaintiff testified among other things, that shortly after the plaintiff's arm was injured he heard her charge the defendant with having injured her arm, which accusation was in the presence of the defendant and several others; but the witness did not hear the defendant make any reply. Another of the plaintiff's witnesses, who was present on the occasion referred to, did not hear the defendant deny the charge. The defendant introduced evidence tending to show that about an hour previous, on the same day, and when the plaintiff's witnesses were not present, the plaintiff made substantially the same charge, which the defendant denied. The judge, among other things, instructed the jury, that if the plaintiff accused the defendant of committing the assault, and he at the same time denied it, it furnished no evidence against him; but if he remained silent when so charged, they might regard it as an admission that he was guilty, or give it such weight as they thought it entitled to; that there was some doubt from the evidence perhaps, whether the accusation after it had been once made was repeated, and if it was repeated, whether the defendant then remained silent; that the jury would not probably conclude that the defendant after he had once emphatically denied the

accusation on that occasion was called upon to deny it again if the accusation was repeated, but that they would give such weight to the defendant's silence when the charge was repeated, if it was repeated, as they thought it entitled to, under the rules which had been stated as to the effect of remaining silent. It was held that there was no error in the instruction; and a verdict having been found for the plaintiff, an order of the special term granting a new trial, was reversed.¹

§ 264. Declarations of the plaintiff respecting the defendant, are not admissible in mitigation of damages, unless they are proved to have been communicated to the defendant.² And where a considerable interval—*e. g.*, two months,—has elapsed between the making of the declarations and the assault, they will not be admissible unless proved to have been communicated to the defendant immediately before the assault.³ Nor can the defendant after proving the plaintiff's declarations made immediately after the affair as to its origin, prove his own statements in reply.⁴ *

35. *Evidence of provocation.*

§ 265. A blow will be justified by an assault unless the battery is excessive.⁵ Where the defendant proved that the

¹ Jewett v. Banning, 23 Barb. 13; s. c. 21 N. Y. 27.

² Chambers v. Porter, 5 Cold. Tenn. 273.

³ Gaither v. Blowers, 11 Md. 536.

⁴ Collins v. Todd, 17 Mo. 537.

⁵ Hazel v. Clark, 3 Harring. 22.

* Acts and declarations of the plaintiff, several months previous to the assault, are not evidence of an intent to commit wanton violence at the time of the assault (Castner v. Sliker, 4 Vroom, 95).

In an action for an indecent assault, the plaintiff cannot prove her own acts at a period of time subsequent to, and somewhat remote from the time of the alleged injury, as evidence of mental suffering (Ford v. Jones, 62 Barb. 484).

Where it is proved that the defendant prevented the interference of a third person, evidence of the simultaneous declarations of such third person, tending to show that he was about to participate in the fight, is admissible in mitigation of damages (Watkins v. Gaston, 17 Ala. 664). The defendant was allowed to prove the contents of a letter which he had written to the plaintiff notifying him that he should carry weapons for his defense, the letter itself having been destroyed. It was held that, if the evidence was admitted to show that the defendant had forewarned the plaintiff that he should arm himself, it was proper (McMasters v. Cohen, 5 Ind. 174).

plaintiff got off of his horse, held up a stick, and offered to strike the defendant, and the latter thereupon gave him a beating, it was held that a moderate battery was, by reason of the provocation, justifiable, and that if the plaintiff relied upon the fact of the defendant having beaten him more violently than he ought to have done, the excessive beating should have been replied and specially set forth.¹ But in order to sustain a justification on the ground of misconduct of the plaintiff which does not amount to an assault, the defendant must prove that he was free from fault.²

§ 266. Although words spoken will not justify a blow, yet they may go in mitigation of damages when they immediately preceded the battery and naturally provoked it.³ When a battery has been committed under highly provoking language, the law will not imply such malice as requires punishment with vindictive damages, unless the wrong be carried to an excess beyond what a reasonable man would do under such circumstances. But the question of damages, in such case is with the jury.⁴ * A. having written a novel,

¹ Dale v. Wood, 7 Moore, 33; Penn v. Ward, 2 C. M. & R. 338.

² Phillips v. Kelly, 29 Ala. 628.

³ Ireland v. Elliott, 5 Clarke Iowa R. 478; Cushman v. Ryan, 1 Story R. 91; Stephen v. Myers, 4 C. & P. 349; Shorter v. The People, 2 Comst. 193; Keyes v. Devlin, 3 E. D. Smith, 518; Thompson v. Mumma, 21 Iowa, 65; Murray v. Boyne, 42 Mo. 472.

⁴ Donnelly v. Harris, 41 Ill. 126; Bartram v. Stone, 31 Conn. 159.

* In Bartram v. Stone, *supra*, the plaintiff having proved threats made by the defendant prior to the assault, the defendant offered to prove that, just before the assault, the plaintiff charged him (in substance) with a theft, and his answer to the charge. It was held that this evidence was proper. The plaintiff then offered to prove the truth of the charge thus made by him, but it was ruled out. Finally, an offer by the defendant to prove his innocence of the charge was rejected. "The offer came with an ill grace from the defendant, who had just procured the rejection of evidence to prove his guilt. And it was of no importance to the issue before the court whether the charge was true or false. The defendant's evidence that the charge was made was admissible, and was admitted only to show the provocation which he claimed, and to rebut the plaintiff's claim that he was actuated by premeditated malice rather than by sudden impulse and excitement. And besides, the charge was presumed to be false, and, therefore, it needed no refutation." In Tennessee, insolence of a slave was held no defense to an action brought by the owner against a white man for assault and battery of his slave, even though it amounted only to moderate and reasonable correction (Walker v. Brown, 11 Humph. 179). But in North Carolina, insolence in a free negro was held to justify an assault by a white man (State v. Jowers, 11 Ired. 555).

B. published a libel on A. in the form of a critique on the novel, for which A. beat him. B. brought an action for the assault and A. a cross action for the libel. It was held that in the action for the assault the libel might be given in evidence in mitigation of damages, although it was the subject of another action, but that being so, the defendant ought not to derive much advantage from it in diminishing the damages. It was also held that the defendant need not put in the novel to show that the criticism in the novel was unfair; neither could the plaintiff give the novel in evidence to show that the critique was a fair one, but that the plaintiff's counsel, in his reply, might assume that certain passages were contained in the work, and argue that the critique was not unfair.¹ It is no excuse for an assault that the complainant said that if he were attacked it would be at the assailant's risk, especially when the assailant was not present at the time the declaration was made.² So, likewise, in an action by husband and wife for an assault on the wife, words or acts of the husband cannot be proved in mitigation of damages unless the wife was privy to them.³ *

¹ *Fraser v. Berkeley*, 7 Car. & P. 621; 2 M. & Rob. 3.

² *Coleman v. State*, 28 Geo. 78.

³ *Everts v. Everts*, 3 Mich. 580.

* The principle upon which proof of the language and conduct of the plaintiff is admissible in these actions, in proper cases, is that inasmuch as the malice of the defendant may be proved to aggravate the damages, therefore the malice of the plaintiff may be shown to mitigate the same. But the malice of the defendant can never increase the damages for the actual pecuniary injury and loss; that is, for the mere personal injury, and such being the case, the malice of the plaintiff cannot mitigate those damages. But damages for injury to the feelings and exemplary damages depend entirely upon the malice of the defendant, and these may be mitigated by proof of the malicious language or conduct of the plaintiff, although the same does not constitute a legal justification of the injury (*Wilson v. Young*, 31 Wis. 574; approving of *Prentiss v. Shaw*, 56 Maine, 427; and disapproving *Morely v. Dunbar*, 24 Wis. 183). In *Prentiss v. Shaw*, 56 Maine, 427, which was an action for personal injuries inflicted by the defendants upon the plaintiff, it appeared that the plaintiff, upon being told that President Lincoln had been assassinated, expressed his gratification; that the defendants, acting under the advice of a provost marshal, and being accompanied by an excited crowd, forcibly placed him in a wagon, took him three miles to a village and kept him shut up for several hours in a room in a hotel there; that during this time persons in the crowd threatened him with extreme personal violence; that on the same day he was taken before a public meeting of citizens, and that he was discharged, pursuant to a vote of the meeting, upon his taking an oath to support the constitution of the United States. The plaintiff claimed damages on these grounds: 1st. For the actual injury to his person and for his detention;

§ 267. Language employed by the plaintiff toward the defendant on a previous occasion cannot be given in evidence in mitigation of damages; nor statements made by third parties to the defendant.¹ But previous misunderstanding and threats of the plaintiff are admissible in evidence to show who was the aggressor.² And it has been held that imputations of the same kind as those which caused the assault, previously communicated to the defendant, are admissible.³ And where it was proved, that the plaintiff cursed the defendant, and when he was struck was about to rise from the chair in which he was sitting with a stick in his hand, evidence of threats made by him against the defendant within the preceding few days was allowed in order to show the motive of the defendant's act.⁴

§ 268. Acts committed, or words spoken by the plaintiff some time previous to the assault, which were a part of a series of provocations, often reiterated, and continued up to

2d. For the injury to his feelings, the indignity and the public exposure; and, 3d. For exemplary damages. The judge at the trial in the court below charged the jury that they could only consider the evidence introduced by the defendants under the second and third of the foregoing heads in mitigation of damages under either or both of said heads, but not under the first head. A verdict having been rendered for the plaintiff for six dollars and forty-six cents, the Supreme Court, on exceptions, held that the instruction was correct. In *Birchard v. Booth* (4 Wis. 67), which was an action for personal injuries inflicted by the defendant upon the plaintiff, it was held that the latter was entitled to recover a fair compensation for all the losses and injuries which he had actually sustained, without regard to the provocation he might have given, if such a provocation did not constitute a legal justification. In *Morely v. Dunbar*, 24 Wis. 183, which was an action for assault and battery, it was held that notwithstanding what was said in *Richard v. Booth*, circumstances of provocation attending the transaction, or so recent as to constitute part of the *res gestæ*, though not sufficient entirely to justify the act done, might constitute an excuse which would mitigate the actual damages; and where the provocation was great and calculated to excite strong feelings of resentment, might reduce them to a sum which was merely nominal. In *Wilson v. Young*, *supra*, Dixon, Ch. J., in a dissenting opinion, adhered to the foregoing decision, and cited the following cases:—*Rhodes v. Bunch*, 3 McCord, 65; *McKenzie v. Allen*, 3 Strobb. 546; *Mathews v. Terry*, 10 Conn. 455; *Coxe v. Whitney*, 9 Mo. 531–532; *Collins v. Todd*, 17 Mo. 539–540; *Corning v. Corning*, 6 N. Y. 103; *Willis v. Forrest*, 2 Duer, 310; *Tyson v. Booth*, 100 Mass. 258; *Marker v. Miller*, 9 Md. 338; *Bingham v. Garnhault*, Buller's N. P. 17.

¹ *Jarvis v. Manlove*, 5 Harring. 452; *Guernsey v. Morse*, 2 Root, 252; *Collins v. Todd*, 17 Mo. 537; *Suggs v. Anderson*, 12 Geo. 461.

² *Murphy v. Dart*, 42 How. Pr. R. 31.

³ *Dean v. Horton*, 2 McMullan, 147.

⁴ *Watkins v. Gaston*, 17 Ala. 664.

the time of the attack, are admissible in evidence in mitigation of damages.¹ In *Dolan v. Fagan*,² the defendant offered to prove a series of provocations repeated and continued from day to day; and that whenever the parties met, the plaintiff insulted the defendant to such an extent, as to render the defendant frantic. The judge ruled that the defendant might show anything that took place on the day of the assault, or the day previous, but not what occurred several days before. The General Term of the New York Supreme Court, in granting a new trial, upon exceptions taken to this ruling, held that the question should have been, not how many hours had elapsed since the provocation was given, but whether, in view of the circumstances of the case, the party had had a reasonable time to cool his blood; and that the jury should have been permitted to hear the nature and extent of the provocation, so as to determine how much of the beating complained of, was, if not deserved, at least caused by the plaintiff's provocation.

§ 269. But evidence with respect to the conduct of the plaintiff at other times, and upon other occasions,—the assault and battery having been committed without any provocation given at the time,—cannot be given in evidence by the defendant in mitigation of damages. “It will not do to say that a man may beat another person, and when sued for the injury show that on some former occasion, the latter had committed some offense for which he justly merited punishment. If the defendant were permitted to go beyond the transactions that took place at the time of the assault, it would be difficult to draw a line between those acts which might, and those which might not be proved. Besides, if the defendant were permitted to show the conduct of the plaintiff at other times, the plaintiff would have a right to introduce evidence to explain that conduct; and thus the attention of the jury would be distracted with a multiplicity

¹ *Stetlar v. Nellis*, 60 Barb. 524; s. c. 42 How. Pr. R. 163.

² 63 Barb. 73.

of questions and issues.¹ Evidence, for instance, would not be admissible, that the plaintiff a long time before the alleged assault and battery had been hostile to the defendant, and committed an assault upon him;^{2*} or that the plaintiff had prosecuted the defendant's child for malicious mischief;³ or that the plaintiff had previously circulated an infamous story of the defendant's sister;⁴ or that a week before the assault, the plaintiff had slandered the defendant's daughters, and the same came to the defendant's knowledge, three hours previous to the assault.⁵

36. *Proof of mitigating circumstances.*

§ 270. Circumstances cannot be given in evidence in mitigation of damages where they amount to a complete justification, and could have been pleaded as such.⁶ But it is otherwise when the circumstances merely palliate the charac-

¹ Mathews v. Terry, 10 Conn. 455.

² Dole v. Erskine, 37 N. Hamp. 316.

³ Schlosser v. Fox, 14 Ind. 365.

⁴ Avery v. Ray, 1 Mass. 12; Lee v. Wolsey, 19 Johns. 319; Swift's Dig. 641.

⁵ Thrall v. Knapp, 17 Iowa, 468.

⁶ Watson v. Christie, 2 B. & P. 224.

* Dole v. Erskine, *supra*, was an action for assault and battery against Erskine & Chase, in which the defendants offered to prove that two or three years previous to the alleged assault, the plaintiff told the witness that some time prior to their conversation, he had had a dispute with Erskine, in the course of which he, the plaintiff, had spit in Erskine's face, and called him a damned coward; and that there had been an enmity between the plaintiff and Erskine for some years previous to, and down to the time of the alleged assault; this testimony being offered to rebut the presumption, that Erskine commenced or committed the first assault, and also in mitigation of damages, it was held inadmissible. The court said: "The testimony offered, was of a conversation between the plaintiff and witness, held from one to three years before the alleged assault, in reference to another distinct transaction between the plaintiff and the other defendant Erskine, of a date anterior to the conversation, and in no way connected with the alleged assault, or with any of the circumstances in which it originated, or by which it was attended. If an assault were committed by the plaintiff upon Erskine, prior to the assault in question, having no connection with it or with any of its circumstances; or if a state of enmity between them resulted from the first assault, which continued down to the time of the last, these facts could furnish no just ground for the inference that the defendant Chase did not assault the plaintiff as alleged, nor that the plaintiff committed the first assault, upon the occasion in question, upon Erskine, nor that Chase interfered between them to prevent a breach of the peace; they were collateral matters having no relevancy to the issue. It is also clear that there is no ground on which the testimony could have been received in mitigation of damages, unless the principle be recognized that Chase should be held to pay less for his assault upon the plaintiff, because the plaintiff had formerly been guilty of an assault upon a third person."

ter of the offense.¹ Where an action was brought for assaulting the plaintiff and seizing his goods, it was held that it might be shown in mitigation of damages that the defendant was a custom house officer, and that the plaintiff was going away from a vessel with goods liable to duty, whereupon the defendant detained him and took possession of his goods; this not amounting to a complete justification, inasmuch as it was not lawful for a custom house officer to take goods forcibly from a person without a previous demand.²*

¹ *Linford v. Lake*, 3 H. & N. 276; 27 L. J. Exch. 334.

² *De Gondouin v. Lewis*, 10 Ad. & E. 117.

* The fact that the defendant procured his own arrest and fine for the offense, is not a defense (*State v. Cole*, 48 Mo. 70).

Where the assault and battery resulted from a quarrel, in which each party charged the other with falsehood, the defendant cannot prove, in mitigation of damages, that what he said was true, and what the plaintiff said was false (*Butt v. Gould*, 34 Ind. 552).

The owner of a slave gave A. liberty to whip him whenever he found him on his premises. A. found the slave on his premises and whipped him; and about three years afterward having found him there again, whipped him a second time much more severely. In an action against A. for the second whipping, it was held that evidence of the first whipping might be given in evidence in mitigation of damages; and that if the plaintiff wished to restrict its influence upon the jury, he should have asked the court to instruct them accordingly (*Boling v. Wright*, 16 Ala. 664).

In *Wadsworth v. Treat*, 43 Maine, 163, which was an action for an assault and battery, it appeared that the acts complained of were committed soon after the defendant had paid an execution upon a judgment recovered against him in favor of the plaintiff's son. It was held not proper for the defendant, in mitigation of damages, to introduce evidence to show that the judgment was obtained in a groundless suit, which he was prevented from defending by inevitable accident. Tenney, C. J., said:—"The judgment of a court of competent jurisdiction, until reversed, is conclusive evidence of a just and legal debt. To receive or enforce payment thereof, by the creditor or his agent, is no ground of complaint on the part of the debtor; and if the evidence offered were allowed, it would authorize the jury to treat as a palliation of the defendant's unlawful and even criminal acts, the plaintiff's conduct which was, in all respects, legal and proper."

In Alabama and South Carolina, it cannot be shown in mitigation of damages that the defendant has been indicted, convicted and fined (*Phillips v. Kelly*, 29 Ala. 628; *Wolff v. Cohen*, 8 Rich. S. C. R. 144). But in Alabama, it has been held that in trespass for injuries to the person, the defendant may give in evidence the record of a prosecution for felony pending against him, and prove by parol, that the indictment and the civil action are founded on the same transaction (*Blackburn v. Minter*, 22 Ala. 613). Evidence that the defendant endeavored to have an interview with the plaintiff, in regard to the affair, and that he voluntarily paid the surgeon for his attendance, is not admissible to disprove the intent and circumstances of the original attack (*Johnson v. McKee*, 27 Mich. 471). That a blow was given in the presence of the court, may be proved in aggravation of the damages, though it might also have been punished by the court as a contempt (*Pendleton v. Davis*, 1 Jones' Law, N. C. 98).

§ 271. In an action for assaulting the plaintiff and attempting, against her will, to have carnal connection with her, and by force and violence, and against her will, to ravish her, evidence to repel the allegation of force, to show consent, or that no violence was done or designed to the will of the prosecutrix, would be admissible as tending to disprove the very body of the offense. To this end it may be proved that the prosecutrix has previously had voluntary sexual intercourse with the defendant. The principle upon which such evidence is allowed is, that it is much more improbable that a common prostitute, or the prisoner's concubine, would withhold her assent, than one less depraved. Such facts are proper for the consideration of the jury, on the ground that they furnish evidence of consent, or evidence from which the jury may infer consent. Within the same principle, every species of evidence showing previous lascivious conduct on the part of the plaintiff, in the presence of the defendant, or in her intercourse with him, designed or adapted to incite or invite him to take liberties with her person, or to induce him to believe that such advances on his part would not be unacceptable to her, are admissible;¹ and the defendant may prove that the plaintiff had intercourse with other persons than him, about the time of the alleged assault.² *

¹ Crossman v. Bradley, 53 Barb. 125; Ford v. Jones, 62 Ib. 484.

² Watry v. Ferber, 18 Wis. 500.

* In Crossman v. Bradley, *supra*, the defendant, at the trial at the circuit, offered to prove that every advance that was made between the parties of a lascivious or licentious character, was made by the plaintiff. He made thirteen different offers of evidence tending to the same end—to show lascivious conduct on the part of the plaintiff, and most of them to acts to or with the defendant, or in his presence. The evidence was, however, excluded and a verdict found for the plaintiff. The Supreme Court, in granting a new trial, said:—"All of this class of evidence, I think, was admissible. The facts stated in these offers, all tended to prove either that the plaintiff was seeking to induce the defendant to have sexual intercourse with her, or was seeking to entrap him into difficulties, such as the commencement and pendency of this suit involves. Upon that assumption, if the latter were her purpose, it is none the less fatal to the action than the former. It takes away the idea that force was necessary, or designed or attempted, to have such intercourse. A woman who leads a man into a trap, or uses meretricious arts with such a design, cannot pretend that there was an attempt to ravish her, or that he attempted such ends by force and against her will and utmost resistance. The offense, and the cause of action, consists in the attempt to accomplish the end implied by force. It is absurd to impute such

37. *Evidence as to character.*

§ 272. The bad character or disposition of the plaintiff, as that he is a turbulent and desperate man, is not admissible in evidence by way of excuse;¹ especially where such

design when the conduct of the woman repels all idea of the occasion or the necessity for the use of force. The evidence excluded, I think, was admissible as tending to show consent on the part of the plaintiff, and that no undesired force or violence was used or attempted upon her person, and, in this view, was a complete defense to the cause of action. The other exceptions, for the exclusion of evidence tending to show improper conduct between the plaintiff and other persons, stand upon different grounds. The evidence of particular acts of immodesty, on the part of the plaintiff or prosecutrix, in this class of cases, should be limited, I think, to those committed with, or in the presence of, the defendant." Referring to *The People v. Jackson*, 3 Parker, 398, as overruling, on the latter point, *The People v. Abbott*, 19 Wend. 192, Johnson, J., in the course of a long dissenting opinion, said:—"The evidence had no legitimate tendency to show that the plaintiff invited or encouraged the defendant's acts, on the day in question. She might have invited or encouraged similar acts, on other days, and the evidence offered might have proved that fact, but it could raise no legitimate inference that the acts were either invited or encouraged on the day and occasion in question. Suppose, in an action of this character between two men, the defense should be that the assault complained of, was in an encounter in which the plaintiff had challenged the defendant to fight with him, and they had mutually agreed to fight. That, if true, would be a good defense in the absence of excessive violence. But suppose, further, that the defendant should offer to prove such challenge and agreement, on the occasion in question, by showing that the plaintiff had done so on a previous occasion. The evidence would be palpably incompetent; and the same rule must apply here. In each case, the fact to be made out is the invitation and consent; and it is perfectly immaterial whether the encounter, in regard to which the assent is sought to be established, is of an amatory or a pugnacious character. The consent, in the one case, must be established by evidence of the same character that would be necessary to establish it in the other. There cannot be one rule where two males are parties, and another where a female is a party against a male. Or take this case upon the other side. Suppose the plaintiff, by way of proving that the defendant had assaulted her on the occasion in question, had offered to prove that he had laid hands upon her, on some previous occasion, without her consent and against her will; I think no one will pretend that such evidence would have been competent, by way of establishing the facts, if objected to. Or, still further, suppose the offer had been to show that the defendant had, on other occasions, assaulted other females in the same way, as evidence bearing upon the issue. These illustrations must show, I think, that the evidence was wholly inadmissible upon the issue. * * * * It is claimed that the evidence was erroneously excluded for the reason that the plaintiff, in her complaint, alleged that the assault and battery complained of was committed with the intent, on the part of the plaintiff, to ravish. But this is no reason, whatever, for its admission. The intent was not the gravamen of the action, in any sense or degree. It was no part of the issue to be tried. It was a mere civil action; and the cause of it did not rest in the intent of the plaintiff at all, as will be seen upon a moment's careful and candid consideration. The very act of battery implies an unlawful intent, and it is not the subject of proof. It is quite immaterial, so far as the cause of action is concerned, what the particular intent was, if the act was not justifiable."

¹ *Smithwick v. Ward*, 7 Jones L. N. C. 64.

character had nothing to do with the assault;¹ notwithstanding the statement or claim of the plaintiff's counsel that the assault committed by the defendant tended to degrade the plaintiff and injure his standing and reputation in the community.² The fact that a man bears a bad character, or keeps company with persons of evil repute, furnishes no just provocation or palliation for doing violence to his person. He may forfeit the good opinion of his fellow men, and become an object of pity or contempt, by reason of his evil habits and associations, and want of moral worth; but there is no principle of law or ethics, on which, for such a cause, impunity is to be granted to those who inflict injuries upon another, or full indemnity to be denied to a party for a violation of the sanctity of his person.^{3*} In an action for assault and battery, committed in arresting the plaintiff while he was intoxicated, the defendants offered to show in justification, that ardent spirits made the plaintiff furious and ungovernable, and that a year or more subsequent to the alleged assault, the plaintiff, while drunk, threw stones at a number of persons, resisted the officers who arrested him, and committed other acts of violence; but it was held that the proposed evidence was not admissible.⁴ Where the assault and battery was committed on the plaintiff after he had left a house into which he had wrongfully intruded, it was urged in behalf of the defendant that evidence of the

¹ *McKenzie v. Allen*, 3 Strobb. 546.

² *Bruce v. Priest*, 5 Allen, 100.

³ *Brown v. Gordon*, 1 Gray, 182; *Ross v. Lapham*, 14 Mass. 275; 1 Greenl. Ev. §§ 52, 55; 2 *Ib.* § 269.

⁴ *Ellis v. Short*, 21 Pick. 142.

* An assault and battery is none the less a wrong for which the party injured is entitled to damages because inflicted on a person enfeebled by disease, or by any other cause. The defendant cannot therefore screen himself from the legitimate consequences of his own unlawful act by proof of the previous bad habits of the plaintiff (*Littlehale v. Dix*, 11 Cush. 364). The following evidence offered by the defendant in mitigation of damages, was held not admissible: That the plaintiff "was a lazy vagabond who would not work if he could help it; that he had no property that could be reached by legal process; that he had been in debt to the defendant a long time, and would not pay him; that the defendant on the day of the assault, had offered the plaintiff ten dollars an hour if he would work for him in payment of said debt, but that he had refused to do it" (*Ward v. State*, 28 Ala. 53).

bad character of the plaintiff and his companion was admissible in connection with the facts which took place in the house previous to the assault. But the court remarked that there were two answers to such a suggestion. The first was, that those facts had no such connection with the assault as to form part of the *res gestæ*. When the assault was committed, the plaintiff had left the house, and thus removed any cause of provocation which his presence there had occasioned. That the other and better answer was, that the motive which led the defendant to order the plaintiff to leave the house, was wholly immaterial to the issue. He had a right to give such an order, and the plaintiff was bound to obey it. After it was obeyed, it was quite immaterial to show that the character of the plaintiff was such as to render his presence in the dwelling of the defendant disagreeable or intolerable, or that he had valid and sufficient reasons for removing him therefrom.¹

§ 273. It has sometimes been contended that where the action is to recover damages for an injury committed against the person with violence, alleging malice, and where the evidence is conflicting, proof of the defendant's general good character should be received. But there seems to be no authority which recognizes any such distinction or exception.² All the circumstances attending an assault, the language, gestures, looks, and general deportment of the parties—everything, in short, which can properly be deemed *res gestæ*, may be laid before the jury. All these are fairly involved in the issue, and the parties are bound to be prepared with proof concerning them. But beyond this, they cannot be permitted to go. The character of the parties is in no way concerned in the nature of the action. It is wholly a collateral matter, and if introduced, would raise a false issue entirely aside from the merits of the case.

¹ Bruce v. Priest, *supra*; Lund v. Tyngsborough, 9 Cush. 36.

² Porter v. Seiler, 23 Penn. St. R. 424; Smithwick v. Ward, 7 Jones, N. C. 64.

38. *Proof of consequences of wrongful act.*

§ 274. The plaintiff may introduce under a general allegation evidence of all the immediate consequences and natural results of which the act was the direct cause, and the jury are to determine whether the consequences did or did not necessarily, or beyond reasonable doubt, result from the injury.¹ Where, therefore, the plaintiff offered to prove by the physician who attended him, that he afterward had a fever, which the physician thought might have been caused by the battery, the evidence was held admissible, although objected to, on the ground that the declaration did not allege any special or particular consequence.² So likewise, in an action for breaking and entering a man's dwelling-house, and assaulting and beating him, the plaintiff was permitted to prove that his wife was so terrified by the conduct of the defendant that she was immediately taken ill and died shortly afterward, not as a substantive ground of damage, but in order to show how outrageous and violent had been the conduct of the defendant.³ But the amount of a physician's bill, or other consequential damage, cannot be proved unless it be specially averred.⁴ *

§ 275. Results of the battery which are purely conjectural cannot be given in evidence, although they be alleged as special damage. As for instance: the loss by reason of the battery of the position of surgeon's mate; or that the plaintiff, who was a merchant, was unable to go to his store, whereby he lost the opportunity to close a bargain which would have been profitable; or that a farmer was incapacitated from gathering his crops, and thereby lost them.⁵ In an

¹ Hodges v. Nance, 1 Swan, Tenn. 57.

² Avery v. Ray, 1 Mass. 12.

³ Huxley v. Berg, 1 Stark. 98.

⁴ O'Leary v. Rowan, 31 Mo. 117; Moore v. Adam, 2 Chit. 198.

⁵ Brown v. Cummings, 7 Allen, 507.

* In an action against a railroad company for an injury received through the wanton misconduct of an employee, evidence of the expenses of the litigation, including the proper fees of counsel, is admissible (New Orleans &c. R. R. Co. v. Allbritton, 38 Miss. 242).

action by husband and wife for an assault and battery on the latter, the loss of the wife's time cannot be taken into consideration in assessing the damages.¹ In cases like the foregoing, there are necessarily intervening events and independent causes which make the connection with the original injury more or less remote. The rule under consideration applies equally to the defense. Therefore, in an action for biting and bruising the plaintiff's finger so that it had to be amputated, it was held that evidence was not admissible that the plaintiff was an habitual drunkard about and after the time of the alleged trespass, from which the jury might infer that the loss of the finger resulted from a state of health produced by intemperance.²

39. *Evidence as to pecuniary condition of party.*

§ 276. An inquiry into the pecuniary circumstances of the party has often been permitted on the question of damages. In Illinois, it was held that evidence might be given of the pecuniary condition of the plaintiff,³ and that it might be proved that the plaintiff was poor and the defendant rich.⁴ In North Carolina, the wealth of the defendant, and in Delaware his condition and pursuit in life, may be gone into.⁵ In Kentucky, the admission of evidence of the wealth of the defendant has been held no ground for a reversal of the judgment unless the verdict is excessive.⁶ In Wisconsin, where in an action for assault and battery there was no proof that all of the defendant's means were required for the support of his family, it was held that evidence of the number, age and condition of his family, offered in mitigation of damages, was properly rejected.⁷

¹ Barnes v. Martin, 15 Wis. 240.

² Wheat v. Lowe, 7 Ala. 311.

³ Cochran v. Ammon, 16 Ill. 316.

⁴ McNamara v. King, 2 Gilman, 432.

⁵ Pendleton v. Davis, 1 Jones' Law, N. C. 98; Jarvis v. Manlove, 5 Harring. Del. 452.

⁶ Gore v. Chadwick, 6 Dana, 477.

⁷ Schmidt v. Pfeil, 24 Wis. 452.

40. *Damages in general.*

§ 277. The authorities class assault and battery with some other causes of action touching the power of juries in the assessment of damages, and allow them to a great extent the exercise of their own discretion; there being in general no precise rule by which the injury can be measured.¹ The jury may have regard to time and place, and in fact every other circumstance which has injuriously affected the plaintiff.² * He is entitled to recover for the bodily and mental pain endured, and for the loss sustained;³ and the expenses of the litigation may be taken into consideration.⁴ In *Klein v. Thompson*,⁵ it was held that the plaintiff was entitled to be allowed the amount of the doctor's bill, although paid previous to the trial by the trustees of the township to whom he was under no legal obligation to refund it. And where it appeared that a former trial for the same cause was brought to a premature close by the death of one of the jurors, it was held that the jury might consider the expenses of the former trial, in their estimate of the damages.⁶

§ 278. It is proper for the jury to consider the probable future injury that will result to the plaintiff from the act of violence. For the damages, when given, are taken to em-

¹ *Wadsworth v. Treat*, 43 Maine, 163; *Com. v. Sessions*, 5 Mass. 437; *Coffin v. Coffin*, 4 Ib. 41; *Brunswick v. Slowman*, 8 C. B. 317; *Gregory v. Cotterell*, 5 El. & Bl. 571; *L. J. Q. B.* 217; *Sedg. on Dam.* 6th ed. p. 669, note 1.

² *Tullidge v. Wade*, 3 Wils. 18; *Taber v. Hutson*, 5 Ind. 322; *Cox v. Vanderkleed*, 21 Ib. 164.

³ *Pennsylv. &c. Canal Co. v. Graham*, 63 Penn. St. R. 290; *Matteson v. N. Y. Cent. R. R. Co.* 62 Barb. 364; *Stockton v. Frey*, 4 Gill, 406; *Smith v. Overby*, 30 Geo. 241; *Holyoke v. Grand Trunk R. R.* 48 N. Hamp. 541; *Smith v. Holcomb*, 99 Mass. 552.

⁴ *Gladwell v. Steggall*, 5 B. N. C. 733; *Cleveland &c. R. R. Co. v. Bartram*, 11 Ohio, N. S. 457; *Roberts v. Mason*, 10 Ib. 277; *New Orleans &c. R. R. Co. v. Allbritton*, 38 Miss. 242; *ante*, § 215.

⁵ 19 Ohio St. R. 569.

⁶ *Noyes v. Ward*, 19 Conn. 250; and see *Linsley v. Bushnell*, 15 Ib. 236.

* But the plaintiff is not entitled to recover for damage which is not the direct result of the wrongful act. Where A. committed an assault and battery upon B. in the course of which B. fired a pistol and wounded C. and C. recovered against B. therefor, it was held that B. in an action against A. for the assault was not entitled to recover the same amount as so much to be reimbursed as special damages (*Whatley v. Murrell*, 1 Strobb. 389).

brace all the injurious consequences of the wrongful act, unknown as well as known, which may thereafter arise. Accordingly, where the plaintiff had received an apparently slight blow on the head, for which he recovered small damages, and it afterward appearing that the skull had been fractured, he brought a second action, which, it was contended, might be maintained for the reason that the former recovery was for a mere battery, and this for a mayhem, it was held that the plaintiff could not recover, for there was but one blow, and that was the cause of action in both suits; and the distinction was pointed out between such a case and one of continuing nuisance, where each continuance is a fresh nuisance.¹

41. *Damages for wounded feeling.*

§ 279. The insult and indignity inflicted upon a person by giving him a blow, with anger, rudeness, or insolence, occasion mental suffering. In many cases they constitute the principal element of damage. They ought to be regarded as an aggravation of the tort, on the same ground that insult and indignity, offered by the plaintiff to the defendant, which provoked the assault, may be given in evidence in mitigation of damages. Even where there is no insult or indignity, mental suffering may be a ground of damage in action for an injury to the person.² In every case where the act complained of was wantonly done, and there is nothing in the evidence which shows improper conduct in the plaintiff at the time he received the injury, he will be entitled to the presumption that he has suffered, in his feelings, as every honorable man would be likely to do under similar circumstances.³ * Where,

¹ Fetter v. Beal, 1 Ld. Raym. 339; *ante*, §§ 22, 112.

² Smith v. Holcomb, *supra*; Canning v. Williamstown, 1 Cush. 451.

³ Wadsworth v. Treat, 43 Maine, 163; Avery v. Ray, 1 Mass. 12; Sampson v. Coy, 15 Ib. 493.

* In Wadsworth v. Treat, *supra*, the mental anxiety, public degradation, and wounded sensibility of the plaintiff, being insisted upon to enhance the damages of an alleged assault and battery, it was objected that they were not specified in the declaration. The court, in holding that this was not necessary, said:—"It cannot be doubted, that mental anxiety, and injury to the finer feelings of human nature, as well as bodily suffering, may be produced from wanton and unpro-

in an action against a colonel of militia, for ordering the plaintiff, a common soldier, to be whipped, it appeared that the colonel had acted unjustifiably and illegally, and out of mere spite and revenge, and the jury gave 150% damages, and a motion was made for a new trial, on the ground that the man appeared to have been moderately punished and not much hurt, and that the damages were disproportioned to his sufferings, the court refused the application, because the man was scandalized and disgraced by such a punishment.¹ In *Reed v. Davis*,² the defendants put the plaintiff's furniture out of the house in which he was lawfully in possession, as tenant at will, and forcibly ejected him and his family. Some of the defendants seem to have thought that the trespass could be committed with impunity, on account of the poverty of the plaintiff. They took the plaintiff by the shoulder, and, to use their own language, "*huddled him out of the house.*" They took hold of the plaintiff's wife and compelled her to go out of the house into the highway, with an infant in her arms, and destitute of suitable clothing which she, in vain, attempted to find among the goods which were put in the road. All the furniture was put out of the house into a heap in the highway, and the plaintiff's papers were blown about the road, and some articles of clothing driven by the wind several rods from the house. During this scene, the wife was greatly agitated. The plaintiff resisted as long as he could, but was obliged to yield to superior force. The jury having found a verdict for the plaintiff for \$500 damages, a motion for a new trial, because the damages were excessive, was denied, the court being equally divided. In an action for wrongfully ejecting the plaintiff from a railroad train, he is entitled to more than nominal damages, although he sustains no pecuniary loss and no in-

voked violence inflicted by the hand of another. And if the former is a proper basis of damages, under a specific allegation in the writ, it does not cease to be so in a general declaration. The obviously probable effects of a beating, may be given in evidence, though not alleged in the declaration."

¹ *Benson v. Frederick*, 3 Burr. 1845.

² 4 Pick. 216.

jury to his person. In such case, the jury may take into account, not only the annoyance, delay, and risk to the plaintiff, but also the indignity.¹ But in an action by husband and wife, for an assault and battery on the wife, the public odium incurred by exposing, at the trial, the domestic quarrels of the husband and wife, cannot be considered by the jury in fixing the damages.^{2*}

42. *Malicious intent as affecting the damages.*

§ 280. Where malice is proved or implied from the circumstances, juries may give exemplary damages beyond those sustained by the plaintiff, by way of punishing the defendant, and for the purpose of setting a wholesome example.³ Accordingly, in an action for attacking the plaintiff and biting off part of his nose, the majority of the court held that the following instruction to the jury by the judge before whom the cause was tried was correct: that "if they should find that the defendant committed the act wantonly, they would be authorized, if they thought proper, in addition to the actual damages the plaintiff had sustained, to give him a further sum as exemplary or vindictive damages, both as a protection to the plaintiff and as a salutary example to others to deter them from offending in like cases."^{4†} So

¹ Chicago &c. R. R. Co. v. Flagg, 43 Ill. 364; Same v. Williams, 55 Ib. 185.

² Barnes v. Martin, 15 Wis. 240.

³ Lane v. Wilcox, 55 Barb. 615; McNamara v. King, 2 Gilman, 432; Foote v. Nichols, 28 Ill. 486; Causee v. Anders, 4 Dev. & Bat. 246; Slater v. Sherman, 5 Bush, 206; Reeder v. Purdy, 48 Ill. 261; Baltimore &c. R. R. Co. v. Blocher, 27 Md. 277; Green v. Craig, 47 Mo. 90; Farwell v. Warren, 51 Ill. 467; *ante*, § 115.

⁴ Pike v. Dilling, 48 Maine, 539.

* In an action of trespass for expelling the plaintiff and his wife from the town, and breaking up the plaintiff's business, injuring his property, making his wife ill, whereby he "lost her comfort and services, and was put to great expense for medicine and medical aid," he cannot recover for the wife's "mental anguish, in being separated from her husband, nor for her feelings as a woman compelled to abandon a chosen residence, and turn her back on associations formed in early life." Damages for such injuries, if recoverable, could only be recovered in an action in which the husband and wife joined (Hooper v. Haskell, 56 Maine, 251; citing Laughlin v. Eaton, 54 Ib. 156).

† In the above case, the jury having found a verdict for the plaintiff for \$151.25, the court, in overruling exceptions to it, remarked that the question

likewise, in another case, the jury were instructed that if they believed that the attack was wanton and unprovoked and with a deadly weapon, they could give exemplary, or even vindictive damages, if necessary to repress the practice of carrying and using deadly or dangerous weapons. It was objected to this instruction that there was no evidence that any such practice existed in the community where the injury was inflicted and the cause tried. It was held that the direction was correct without the reason. If the attack was wanton and unprovoked, and with a deadly weapon, it was a case for vindictive damages, whether there was such a practice or not, and whether it would repress it or not. The addition could not injure the defendant, but might benefit him, for the jury might infer that unless it was necessary to repress the practice spoken of, vindictive damages should not be given.¹ In Maryland, where a child was run over by a steam engine under circumstances of wanton, malicious and out-

presented by the instructions had never before been determined in Maine, but that they were in entire accordance with the weight of judicial authority in this country. The following cases were cited:—*Day v. Woodworth*, 13 How. 371; *Tillotson v. Cheetham*, 3 Johns. 56; *Taylor v. Church*, 4 Seld. 452; *Hopkins v. Atlantic & St. Lawrence R. R. Co.* 36 N. H. 10; *Huntly v. Bacon*, 15 Conn. 267; *Pastorius v. Fisher*, 1 Rawle, 27; *Porter v. Seiler*, 23 Penn. 424; *Stout v. Prall*, Coxe N. J. R. 79; reaffirmed in *Winter v. Peterson*, 4 Zab. 524; *McNamara v. King*, 2 Gilman, 432; *Deane v. Blackwell*, 18 Ill. 336; *Fleet v. Hollenkemp*, 13 B. Mon. 219; *Kountz v. Brown*, 16 B. Mon. 577; *Louder v. Hinson*, 4 Jones, 369; *Tullidge v. Wade*, 3 Wilson, 18. Rice, J., dissenting, said: "In actions of tort, damages are given as a compensation for injuries received, and should be commensurate with those injuries—no more, no less. Exemplary, vindictive, or punitive damages are something beyond, given by way of punishment. This rule of damages is presented in the ruling in this case distinctly and without any ambiguity. Hitherto it has not been adopted in this State. Deeming it unsound and pernicious in principle, I cannot concur in engrafting it upon our law, nor in adopting it as a rule of practice in our courts. Under the rule as stated in this case, a defendant may be required to make full compensation to the injured party, be punished by fine without legal limitation by a jury for private benefit, and then be liable to indictment by a grand jury for a public wrong, and punished by the court to the extent of the law, and all for the same transaction. The soundness of the rule has been much discussed *pro* and *con.* by courts and jurists. The authorities upon the subject are numerous. To collate or analyze them would give no additional light. A statement of the proposition itself is, to a legal mind, on principle, a conclusive argument against it. It stands only on contested and doubtful authority. But no number of cases or weight of authority can, in my judgment, relieve the rule of its inconsistency with the universally recognized principles of natural justice, nor free it from the smack of barbarism." See *Sedgwick on Damages*, 6th ed. p. 566, *note*, where the doctrine of exemplary damages is ably discussed.

¹ *Porter v. Seiler*, 23 Penn. St. R. 424.

rageous conduct on the part of the defendant, the plaintiff was awarded exemplary damages.¹ In Mississippi, it has been held, that to justify a verdict for such damages, there must have been either malice, violence, fraud, or oppression.²

§ 281. We need scarcely say that there is a distinction between malice in law, which is a mere inference or presumption of law, from an act unlawful in itself injurious to another, and express or actual malice, which relates to the actual state or condition of mind of the person who did the act, and which is a question of fact upon the circumstances of each particular case. To constitute express, or actual malice, it is not necessary that the act should proceed from hatred or ill-will to the person injured, but it may be inferred from a mischievous intention of the mind, or from inexcusable recklessness.³ An act done with the intention of annoying, harassing or teasing, after due warning, is malicious, in the sense in which that term is understood in the law and as it is applied to the question of damages. A consideration of the circumstances under which a wrong was committed necessarily includes the motive or intention of the party charged. There is an obvious distinction between an injury proceeding from an act done with no harmful intent, and an injury, though greater than was intended, evincing a mischievous disposition.⁴ In an action for assault and battery, it appeared that the defendant was the keeper of a liquor store in New York; that on a Sunday afternoon he invited the plaintiff to come to his store and take a glass of wine; that the plaintiff accepted the invitation, and while they were at the store the defendant and other persons who were there commenced playing at a game. The game consisted in blowing a sharp piece of steel, with feathers attached to it, through a tube at

¹ Balt. &c. R. R. Co. v. Breinig, 25 Md. 378.

² New Orleans &c. R. R. Co. v. Statham, 42 Miss. 607.

³ 2 Stark. Ev. 674; Rex v. Harvey, 2 B. & C. 268; Duncan v. Thwaites, 3 Ib. 585; Wiggin v. Coffin, 3 Story, 7; Com. v. York, 9 Metc. 104; Etchberry v. Levielle, 2 Hilt. 40.

⁴ *Ante*, §§ 14, *et seq.*

a target. When the defendant blew the piece of steel at the target, the plaintiff went up to count the game; whereupon the defendant blew through the tube at him, and the instrument or arrow struck him in the back collar of his coat. The defendant was then told by a bystander that he ought not to do it; that it was dangerous; that if the plaintiff should turn his head it might hurt him. But not heeding this warning, he blew the arrow at the plaintiff again and struck him in the back. The plaintiff then went up to the defendant in a menacing manner and raised his fist to strike him. Some hard words passed between them, the plaintiff appearing to be in a passion, the defendant laughing and in good nature and not excited. A few minutes after, the plaintiff being near the target, the defendant shot at him again, and as the plaintiff stepped back from the target and turned his head, the defendant pointed the tube at him, blew through it again, and the instrument struck the plaintiff in the eye. The bystanders gathered around, the plaintiff drew the instrument from his eye, and as he did so the blood flowed and he seemed to be in much pain. Inflammation ensued, and he suffered a good deal for four and a half months, being confined to his bed during the most of that time, and becoming blind in the eye. His physician's and other bills amounted \$912. He was a builder. He had to abandon his work in consequence of the injury, and had not been able up to the time of the trial—seven months afterward—to do any business. At the trial, the judge was requested to instruct the jury, that as the plaintiff was present in a public tippling house engaged in playing the game out of which the injury arose, which was in violation of law, he could not recover damages for the injury, or, as he was engaged in an amusement in an unlawful manner, that that might be taken into consideration in mitigation of damages, which instruction the judge refused. He charged the jury that if the injury was the result purely of an accident, then the defendant was liable only for the actual damages, but that if the defendant acted with the intention of annoying, harassing or

teasing the plaintiff after warning, then the rule would be different, even though the actual injury was unintentional. A verdict having been found for the plaintiff for \$5,000, the court of review refused to disturb it.¹*

43. *Damages for assault upon child or servant.*

§ 282. In an action for assault and battery upon the child or servant of the plaintiff, the suit being for the loss or service, the actual loss, and if sickness resulted, the expenses attending such sickness, can alone be recovered, notwithstanding the person assaulted was a female, and the as-

¹ Etchberry v. Levielle, 2 Hilton, 40. See Hyatt v. Adams, 16 Mich. 180.

* In Etchberry v. Levielle, *supra*, the court, in affirming the judgment, said: "The defendant may not have intended to put out the plaintiff's eye, or to do him any serious bodily harm. But he wantonly and recklessly persisted in shooting or blowing at him a sharp pointed instrument, impelled, according to the testimony, with great directness and force; an act highly dangerous, deliberately done, exhibiting a reckless disregard of the safety of others, and a wanton and malicious spirit of mischief. He repeated the act after he was urged to desist and warned that it was dangerous; and when the plaintiff, provoked by the repetition of the assault, threatened to strike him, he persisted, did it again, and desisted only when the dart or arrow lodged in the plaintiff's eye. That this was acting maliciously, in the sense in which the term is understood in the law, does not, in my judgment, admit of doubt. It evinced a deliberate intention to vex, injure and annoy, regardless of consequences. The consequences were probably more serious than was intended, but the malicious act consisted in persistently doing, against all warning and remonstrance, what involved the possibility of such a consequence. The object of punitive or exemplary damages is that they may operate as a punishment and restraint to the offender, and as a benefit and example to the community, and certainly conduct like this comes within the spirit and intent of this principle of the law of damages." In an action for assault and battery, the defendant justified that at the request of the plaintiff's mother he went to the house where the plaintiff and her mother resided in order to remove the plaintiff's mother, who was infirm, therefrom, and that he used no more force than was necessary to effect such removal. The judge instructed the jury that the animus of the defendant ought to have a great effect on the damages; that if he acted honestly, solely with a view to the welfare of the plaintiff's mother, the damages ought to be less than if he acted with wrong motives; that on the question of animus there was evidence that the defendant, shortly after the removal, procured from the plaintiff's mother a will, giving him all the property absolutely unconnected with any trust, and that it was for the jury to say whether the removal was made with a design to have the will executed and from improper motives, or whether his motives were good and charitable. It was held that this instruction was erroneous, the effect of it being necessarily to influence the jury to find upon a matter not in evidence; that the removal was from improper motives, and upon such a finding, to lead the jury to enhance the damages, under the charge that the damages should be greater if the animus was improper than if it were good and charitable (*Crossman v. Harrison*, 4 Robertson, 38). In Louisiana, where in an action for assault and battery it appeared that the plaintiff, a free woman of color, had been whipped by an officer under an honest mistake as to her identity, it was held that she was not entitled to exemplary damages (*Perrine v. Blanchard*, 15 La. An. 133).

sault was of an indecent character, and very aggravated.* In such case, the female can herself maintain an action in which she will be entitled to exemplary damages.¹ But in *Edmondson v. Machell*² trespass was brought by an aunt for assaulting and beating her niece, *per quod*, &c.; and, at the same time, another action was brought by the niece for the same assault. On the trial, the counsel for the aunt withdrew the record, in the latter case, and declared their intention not to try it. The defendant insisted that the jury could only give damages for the loss of service. The court ruled otherwise, and placed the case on a footing with the action for seduction. On a motion for a new trial, it was admitted that the damages were not excessive if the jury had a right to take both actions into consideration; and the court, on the niece stipulating not to proceed in her action, refused to grant a new trial. It is obvious, from the report of the case, that without this stipulation, the result would have been different. In a recent action for assault and battery in Missouri, alleged to have been committed upon the plaintiff's minor son, the judge, at the trial, charged the jury that, if they found for the plaintiff, they should allow such damages as would compensate him for his loss of time, and for any damage he might have suffered, permanent or

¹ *Whitney v. Hitchcock*, 4 Denio, 461.

² 2 Term R. 4.

* But in an action on the case for seduction, exemplary damages may be recovered (*Sedgw. on Dam.* 6th ed. p. 680). As observed by the court, in *Whitney v. Hitchcock*, *supra*, the action for seduction is peculiar, and would seem to form an exception to the rule that damages only can be recovered where the action is for loss of service consequential upon a direct injury. But there, the party directly injured cannot sustain an action, and the rule of damages has always been considered as founded upon special reasons only applicable to that case. *Akerley v. Haines*, 2 Caines R. 292, was an action of trespass for debauching and getting with child the daughter of the plaintiff. The defendant's counsel maintained that, if the daughter was of bad reputation, previous to the defendant's connection with her, the present action would not lie. The judge, before whom the case was tried, instructed the jury that, "though they might believe in the previous want of chastity, they ought, nevertheless, to find a verdict for the plaintiff, but assess damages only for the loss of service and expenses of lying in, and nothing for the loss of reputation." The Supreme Court, in refusing a new trial, said: "The direction of the judge was right. The daughter not being virtuous, is no reason why her father, unless he connived at and knew of her criminal intercourse, should not recover for the injury done to him by the loss of her service and the expenses of her confinement."

otherwise, and for the time and trouble in taking care of his son; and, in addition thereto, they might allow such further sum, for exemplary damages, as they might think the circumstances and facts in evidence warranted. And a verdict having been found for the plaintiff, it was sustained on appeal.¹

§ 283. Where in an action for brutal violence to a female, it is proved that her resistance to sexual intercourse was overcome, and her consent thereto ultimately obtained, the sexual intercourse cannot be taken as the basis of damages, unless the consent was obtained by the violence, in which case, being a part of the assault, it is a ground for exemplary damages.

44. *Damages after conviction for public offense.*

§ 284. In several, if not in most of the States, the fact that the defendant has already been convicted and fined, in a criminal prosecution, for the same offense, will not affect the plaintiff's right to recover exemplary damages.²* But in Indiana, vindictive damages are not allowable in cases of malicious trespass, the act being punishable criminally.³

¹ Klingman v. Holmes, 54 Mo. 304; disapproving Whitney v. Hitchcock, *supra*.

² Cook v. Ellis, 6 Hill, 466; Phillips v. Kelly, 29 Ala. 628; Wolff v. Cohen, 8 Rich. S. C. R. 144; Roberts v. Mason, 10 Ohio, N. S. 277; Jefferson v. Adams, 4 Harring. 321; Corwin v. Walton, 18 Mo. 71; Wilson v. Middleton, 2 Cal. 54.

³ Butler v. Mercer, 14 Ind. 479.

* In Cook v. Ellis, *supra*, which was an action for an assault upon the plaintiff with intent to have carnal connection with her, it was not denied that there were circumstances in proof which authorized the jury to give exemplary damages, had not the defendant been convicted and fined \$250, for the same assault, which he had paid. The court said:—"In vindictive actions (and this is agreed to come within that class), jurors are always authorized to give exemplary damages where the injury is attended with circumstances of aggravation; and the rule is laid down without the qualification, that we are to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. That the criminal suit is not a bar to the civil, and that no court will drive the prosecutor to elect between them, if the former be by indictment, is entirely settled. He may proceed by both at the same time. Nor will the court even stay proceedings in the civil action, to govern themselves by the event of a pending criminal prosecution. We concede that smart-money, allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes incidentally compensa-

45. *Damages accruing after commencement of action.*

§ 285. The plaintiff is entitled to such damages as are the necessary or usual consequence of the injuries received, although they accrued after the commencement of the suit.¹ Accordingly, where the leg of a slave was broken by another, it was held that it might be proved that the slave died after the action was commenced, or that the injury proved greater by lapse of time, such consequences being the immediate results of the trespass.² So, likewise, in an action, by a master, for a personal injury to his servant, it was held that the plaintiff was entitled to recover, not only for the loss of the services of his servant, up to the period of commencing the action, but if the servant continued disabled, down to the time when it appeared, in the evidence, that the disability might be expected to cease.³

tory for damages, and, at the same time, answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution, any more than on what may be done. Nor are we prepared to concede that either a fine, or imprisonment, or both, should be received in evidence to mitigate damages. True, if excluded, a double punishment may sometimes ensue, but the preventive lies with the criminal rather than the civil courts. The former have ample power, if they choose to exert it, of preventing any great injury from excess of punishment. In a proper case, if the party aggrieved will not release his private injury, or stipulate to waive a suit for it, or at least to waive all claim for smart money, the courts may, after conviction, either impose a fine merely nominal, or stay proceedings till a trial shall be had in the civil action, and govern themselves accordingly, in the final infliction of punishment. This, or something equivalent, has often been done. The more usual case in England is, where the party comes as the principal actor in the prosecution, by way of applying for a criminal information. The court will then make it a condition that he shall waive his right of action. Indeed, so common has this become, that the very application by the party is said to be considered, as an implied stipulation, not to bring a private suit. This will therefore be stayed. And even where he proceeds by indictment, the court often, in effect, turn over the whole case to be disposed of by action, in the method before mentioned. The more usual course is to stay proceedings on the criminal side, till those on the civil side are at an end. This is not done with us, till after conviction; and such is, no doubt, the better practice" (citing *Jones v. Clay*, 1 Bos. & Pul. 191; *Jacks v. Bell*, 3 Carr. & Payne, 316; *Cady v. Barlow*, 1 Man. & Ryl. 275; *Rex v. Sparrow*, 2 T. R. 198; *Rex v. Fielding*, 2 Burr. 654; s. c. 2 Kenyon's R. 386; *Com. v. Bliss*, 1 Mass. 32; *Com. v. Elliot*, 2 Id. 372; *The People v. Genl. Sess. of Genesee*, 13 Johns. 85).

¹ *Burchard v. Booth*, 4 Wis. 67; *ante*, §§ 22, 112, 278.

² *Johnson v. Perry*, 2 Humph. 569.

³ *Hodsoll v. Stallebrass*, 11 Ad. & E. 301.

46. *Inadequate or excessive damages.*

§ 286. The damages must have been clearly inadequate or excessive to furnish a ground for a new trial. Six cents damages for a violent blow would usually be deemed grossly inadequate. But if the parties were engaged in a broil from which very little injury resulted to either, such a verdict would not be disturbed.¹ The finding, however, of trivial damages for breaches of the peace, which would lead the ill disposed to consider an assault a thing that might be committed with impunity, should not be encouraged. The following instruction was held not exceptionable:—That in assessing the damages, it was the right and duty of the jury “to consider the effect which the finding of light or trivial damages, in actions for breaches of the peace, would have to encourage a disregard of the laws and disturbances of the public peace.”² A much higher verdict than \$85, for a violent beating and wounding with an axe, would not be deemed excessive, especially where it was proved that the defendant was amply able to pay.³ Where a landlord committed an aggravated assault upon one of his guests, a verdict for \$600 was sustained.⁴ But where an action was brought by a servant, for an assault alleged to have been committed upon him by his master, and it appeared that the master had given the servant a slight blow, for impertinent behavior, whereupon the servant turned upon his master and gave him a violent thrashing, and then brought an action for the original assault upon himself, and recovered 40% damages, the court granted a new trial.⁵ And in an action against a railroad company, for the forcible ejection of the plaintiff from a street car, by the conductor, there being no evidence of malice on the part of the conductor, \$750 damages were held excessive.⁶ And the same was held as to a verdict of \$2,500, in

¹ Silverman v. Foreman, 3 E. D. Smith, 322.

² Beach v. Hancock, 7 Fost. 223.

³ Gore v. Chadwick, 6 Dana, 477.

⁴ Kelsey v. Henry, 49 Ill. 488.

⁵ Jones v. Sparrow, 5 Term R. 257.

⁶ Turner v. North Beach R. R. Co. 34 Cal. 594.

an action for an assault on a married woman, with an attempt to commit rape, it appearing that the plaintiff had received no actual injury.¹

47. *Costs.*

§ 287. A knowledge by the jury of the costs which will follow their verdict, is sometimes important to enable them to render a proper measure of justice. In *Elliott v. Brown*,² the jury asked to be instructed as to what amount of damages would carry costs, but the instruction was not given. When the case came before the Supreme Court from the New York Common Pleas where it was tried, Chief Justice Savage said: "It is the duty of the jury to ascertain what damages the plaintiff has sustained, and also how much the defendant ought to be punished; and if the jury consider the costs as part of the amount which the defendant should pay, and wish to give no greater damages than barely enough to carry costs, or to give such a sum as will not carry costs, they have a right to do so. I think therefore, it would have been proper to have given the jury the information they wanted." In *Nolton v. Moses*,³ Willard, J., said: "It is common experience, to apprise the jury as to the effect of their verdict upon the parties in respect to the question of costs; and the practice has been expressly and repeatedly affirmed." And in *Waffle v. Dillenbeck*,⁴ the judge refused to instruct the jury, that in arriving at the amount of their verdict, they had nothing to do with the question of costs, but gave them full and minute information, as to what costs a verdict for the plaintiff would carry.

§ 288. In New Hampshire, it has been held that where in an action for assault and battery, several defendants prevail by the proof or disproof of substantially the same facts, the mere circumstance that they have pleaded severally,

¹ *Timmons v. Broyles*, 47 Ill. 92.

² 3 Barb. 31.

³ 2 Wend. 497.

⁴ 39 Barb. 123.

will not entitle them as of course, to more than one bill of costs.¹ In Massachusetts, a different rule is said to have been established;² but subject to exceptions.³ In New York, it has been held that where two defendants are sued jointly for assault and battery, and, without any improper motive, have appeared and defended by different attorneys, and each defendant has pleaded separately, upon the acquittal of both, each is entitled to full costs.⁴ In the same State, in an action for assault and battery against two, a verdict having been rendered against one of the defendants, and in favor of the other, one perfected judgment against the plaintiff for costs, including the costs of the judgment, and the other defendant made a bill of exceptions, the judgment was allowed to stand on condition that the costs of entering it up should be deducted, though the cause was still pending on the bill of exceptions.⁵ *

48. *Verdict.*

§ 289. When in an action for assault and battery there is

¹ Prescott v. Bartlett, 43 N. Hamp. 298.

² Fales v. Stone, 9 Metc. 316; Davis v. Hastings, 8 Cush. 314; Mason v. Waite, 1 Pick. 458; West v. Brock, 3 Pick. 303.

³ Peabody v. Minot, 24 Pick. 334; Miller v. Lincoln, 6 Gray, 556.

⁴ Tenbroeck v. Paige, 6 Hill, 267.

⁵ Webb v. Bulger, 4 Hill, 588; *ante*, § 121.

* In England, statutes limiting the costs for the purpose of preventing trifling and malicious actions were passed in the reigns of Elizabeth, James First, and Charles Second. The principal statute was passed in the reign of Charles Second. It provided that "In all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause, shall not find and certify under his hand, upon the back of the record, that an assault and battery were sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto. In cases of assault and battery and trespass, the certificate of the judge would regulate the costs. In all other personal actions, the verdict alone regulated them. The New York statute was formerly as follows: "If the plaintiff, in an action for assault and battery or false imprisonment, or for slanderous words or for libel, brought in the Supreme Court, recover fifty dollars or less, such plaintiff shall recover no more costs than damages." The revisers, in their notes, say that by this provision it was hoped a fruitful source of litigation might be destroyed. The New York Code, § 304, enlarges this class, adding other personal actions, and granting full costs when the plaintiff recovers fifty dollars or over.

a plea of not guilty, the jury are not at liberty to take into consideration the circumstances with the view to reduce the verdict below the amount of damages actually sustained, if those circumstances could have been pleaded.¹ Nor will the court enter a verdict for the defendant on the plea of the general issue when he has obtained the verdict on a plea of *son assault demesne*.² *

§ 290. If the assault and battery be committed in pursuance of a common intent, or where all are present, aiding, abetting, or encouraging, or have previously counseled the violence, a joint verdict against all is proper.³ To a declaration, charging a joint assault, the defendants pleaded jointly not guilty. The judge observing this, and not knowing whether it was intentional or through inadvertence, inquired of the counsel what the plea was, and was informed that it was intended to meet the declaration exactly. The defendants then claimed that if the jury found one defendant guilty, and the other not guilty, they should render a verdict accordingly, which was not controverted on the part of the plaintiff. The court, however, chose to treat the case as the defendants had stated their plea treated it, and told the jury that if they found the facts to be proved as stated in the plaintiff's declaration, they must return a verdict against the defendants. It was held that as the declaration alleged a joint assault only, and the plea was expressly intended to meet that allegation, and there was no claim that one could be subjected for an assault by the other unless they acted in concert, the defendants had no ground of complaint against the charge.⁴

§ 291. If the action be against two, damages cannot be severed, though the assault be proved to have been com-

¹ Watson v. Christie, 2 B. & P. 224.

² Mullins v. Scott, 5 Bing. N. C. 423.

³ Southwick v. Ward, 7 Jones' Law, N. C. 64; *ante*, §§ 23, 212.

⁴ Brown v. Wheeler, 18 Conn. 199.

* Where under a plea of not guilty and *son assault demesne* to a charge for assault and battery there is a verdict of guilty, the justification is necessarily negatived (Pleasants v. Heard, 15 Ark. 403).

mitted by one defendant with more violence and more circumstances of aggravation.¹ If one of the defendants beat the plaintiff violently, and the other a little, the real injury is the aggregate inflicted by both, and each is responsible for the whole damage; but the malice of one defendant cannot be made a ground of aggravation of damage against the other, who was altogether free from any improper motive.²*

§ 292. A question as to the form of the verdict arose in *Mitchell v. Smith*,³ which was an action against two for a joint assault, in which each defendant separately pleaded the general issue, and also that the plaintiff committed the first assault upon one of the defendants, who was the father of the other. The following verdict, notwithstanding its grammatical errors, was held sufficient: "That as to the first issue the defendants are guilty of the premises within charged upon him in manner and form as the plaintiff hath within alleged," and "as to the other issue, that defendants, of their own wrong, and without any such cause as they within by pleading hath alleged, assaulted the plaintiff in manner and form as he hath within alleged." †

¹ *Brown v. Allen*, 4 Esp. 158. But see *Bevin v. Linguard*, 1 Brevard, 503; *ante*, §§ 116, 123.

² *Clark v. Newsam*, 1 Exch. 131.

³ 4 Md. 403.

* Where an assault and battery has been committed by several, and a recovery had against one, such recovery will be a bar to an action for the same offense against the rest (*Smith v. Singleton*, 2 McMullan, 184).

† In an action for an assault and battery, the jury agreed on a verdict for the plaintiff, and, in ascertaining the amount of damages, each juror marked a sum, and the whole amount was divided by twelve, but the jury did not return the quotient as the amount of damages, but deliberated, and returned a less sum. Held no cause for setting aside the verdict (*Cheney v. Holgate*, Brayt. 171). The rule, that in cases of mayhem the court may increase the damages after verdict *super visum vulneris*, no longer exists (*McCoy v. Lemon*, 11 Rich. Law, S. C. 165).

CHAPTER II.

FALSE IMPRISONMENT.

1. False imprisonment defined.
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21. Evidence.
22. Damages.

1. *False imprisonment defined.*

§ 293. False imprisonment consists in restraining another of his liberty without sufficient authority. Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.¹ Where a complaint alleged that the defendants illegally, and without warrant, arrested the plaintiff, and by force compelled her to go to a police station, where they detained and restrained her of her liberty without reasonable cause, it was held that it stated a case of false imprisonment, and not of malicious prosecution, and that the question of probable cause did not arise.² But arrest under legal authority does

¹ 3 Blk. Com. 127.

² Burns v. Erben, 1 Robertson, 555; 26 How. 273; affd. 40 N. Y. 463.

not constitute false imprisonment,¹ although made by virtue of a warrant issued irregularly and from bad motives.² *

§ 294. The offense may be committed without actual force. It is sufficient that one has been deprived of his liberty through reasonable fear of personal difficulty.³ A person may be restrained by words; for he is not obliged to incur the risk of violence and insult by resisting until actual violence be used.⁴ Therefore, it is false imprisonment to stop and prevent another by means of threats from proceeding on the public highway.⁵ Where a constable commands another to go with him, and he does so, it is constructively an imprisonment, though no actual force be used; for the party addressed feels that he is wholly in the power of the constable.⁶ The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully killing his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said that he would convict the plaintiff in a penalty under the trespass act, in which case he would go to prison. The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out and see if they can settle the matter, and if not bring him in again, and I

¹ Coupal v. Ward, 106 Mass. 289.

² Johnson v. Maxon, 23 Mich. 129.

³ Smith v. State, 7 Humph. 43; Johnson v. Tompkins, 1 Baldw. 571.

⁴ 3 Stark. Ev. 1448; Brushaber v. Stegemann, 22 Mich. 266.

⁵ Bloomer v. State, 3 Sneed, 66.

⁶ 2 Inst. 589; Bull. N. P. 62; Bird v. Jones, 7 Q. B. 742; 9 Jur. 870.

* The distinction between false imprisonment and malicious prosecution is that if the imprisonment is under legal process, but the action has been commenced and carried on maliciously, and without probable cause, it is malicious prosecution; but that if it is extrajudicial without legal process, it is false imprisonment. The former is the subject of an action on the case; while for the latter trespass *vi et armis* is the remedy (Johnstone v. Sutton, 1 T. R. 544; Turpin v. Remy, 3 Blackf. 210; Colter v. Lower, 35 Ind. 285). In Kansas, under the code, where a party has a cause of action containing all the elements of both malicious prosecution and false imprisonment as understood at common law, he is not bound, as at common law, to bring his suit for one or the other, but may prosecute for his whole cause of action (Bauer v. Clay, 8 Kansas, 580). False imprisonment may include a battery, but the latter is not necessarily included in the former (1 Stark. Ev. 1113).

must proceed to commit him under the act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money. It was held that this was an assault and false imprisonment, for which trespass would lie, and which, as no conviction had been drawn up, the defendant could not justify.¹

§ 295. But to constitute an imprisonment there must be an entire restraint of the will. It was accordingly held not enough to show that the defendant, at a police office, stood before the plaintiff, and said, "You cannot go away till the magistrate comes," if it appear that he relinquished that attitude, and went to another part of the office before the plaintiff had made any attempt to depart.² And where part of a public footway on a bridge was appropriated for seats to view a regatta, and accordingly separated from the adjoining carriage road by a temporary fence, and the plaintiff, claiming a right of way across the part so appropriated, climbed over the fence, but was prevented from proceeding by two policemen, who at the same time told him that he might go back if he pleased, which the plaintiff refused to do, and stayed where he was half an hour, it was held that this did not constitute an imprisonment.³ So, likewise, where A. has a chamber adjoining the chamber of B., with a door that opens into it, by which there is a passage for exit, and A. has another door which C. stops so that A. cannot go out by that, there is no imprisonment of A. by C. (although the latter is a trespasser), because A. may go out by the door in the chamber of B.⁴

§ 296. One who keeps the key of a room, with knowledge that another is imprisoned therein, is a trespasser.⁵ But a person who places himself in a situation to be restrained of his liberty, cannot complain that he is unlawfully im-

¹ Bridgett v. Coyney, 1 M. & R. 211.

² Cant v. Parsons, 6 Car. & P. 504.

⁴ Wright v. Wilson, 1 Ld. Raym. 739.

⁵ Bro. Abr. Trespass, Pl. 133, 256, 265.

³ Bird v. Jones, *supra*.

prisoned, especially if he refuses to depart when he may.¹ In an action for false imprisonment, in which the plaintiff alleged that he, being an officer, went on board of a vessel of which the defendant was master, in order to arrest the steward, and was carried to sea by the defendant, it was argued that the plaintiff being lawfully on board the ship, the carrying of him away was a trespass, although he had not used due diligence in getting on shore. But it was held that, as the plaintiff went on board for a particular purpose, at the very time when the ship was about to leave the wharf, and as he had, in common with others, repeated notice that her fasts were about to be cast off, and that persons not belonging to the ship, should quit her; and as it had been proved that the plaintiff was guilty of negligence in regard to it, when he had sufficient time to leave the ship after performing his duty, it followed that no fault attached to the defendant, and he could not be charged as a trespasser.² *

2. *Arrest by private person.*

§ 297. In view of the liability, which we have seen will be incurred by the unauthorized depriving another of his liberty, it becomes important to consider under what circumstances an individual can lawfully make an arrest. At common law, a private person is permitted, in certain cases, to seize and detain another without warrant.³ All who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender; and a private individual may justify breaking and entering another's house and imprisoning him, to prevent him from committing

¹ *Moses v. Dubois*, Dudley's S. C. R. 209.

² *Spoor v. Spooner*, 12 Metc. 281.

³ *Hawk. P. C.* 157.

* In the above case, the plaintiff contended that the defendant being captain of the ship, was, in law, conclusively liable, in his character as master, for trespasses like the one committed upon the plaintiff. The judge before whom the cause was tried ruled that the presumption of law was, that the captain was liable, but that this presumption was subject to be controlled by evidence, and therefore that the question who had actual control of the ship, was a question of fact to be passed upon by the jury.

murder.¹ It is lawful to lay hands upon another to preserve public decorum, as to turn him out of church and prevent him from disturbing the congregation, or a funeral ceremony.² So, if a person intend a right act, as to assist a drunken man, or prevent him from going along the street without help, and a hurt should ensue, he would not be answerable.³ But it has been held that the continued wilful and malicious ringing of a door bell, is not, in itself, a breach of the peace, so as to justify the arrest of a person by a private individual.⁴*

§ 298. In case of an affray, any one may, without a warrant, restrain the offenders in order to preserve the peace.⁵ But a private individual who has witnessed an affray, cannot, after the affray has ceased, lawfully give the affrayers, or one or some of them, into custody, unless the affrayers continue on the spot and refuse to disperse, and there is a reasonable apprehension of a renewal of the affray. Where, in an action for arresting the plaintiff and detaining him ten hours, the defendant, who was not an officer, pleaded that the plaintiff was making a great noise, affray, disturbance and riot, in breach of the peace, and because the defendant, being a laborer and lodger in the said house, at the request of the owner of the house, in attempting to keep the peace and stop the noise, was attacked by the plaintiff, he gave the plaintiff in charge to another man to take him into custody and keep him until he could be carried before a justice of the peace, it was held no justification.⁶

¹ Handcock v. Baker, 2 B. & P. 260; Colby v. Jackson, 12 N. Hamp. 526.

² Glever v. Hynde, 1 Mod. 168; Hall v. Planner, 1 Lev. 196.

³ Bull. N. P. 16.

⁴ Grant v. Moser, 5 M. & G. 123.

⁵ 2 Inst. 52; Burns' Justice, 92; Hawkins' P. C. 174, b. 2 s. 20; Timothy v. Simpson, 1 C. M. & R. 757; Price v. Seeley, 10 Cl. & Fin. 39; Byrnes v. Brewster, 2 Q. B. 355.

⁶ Phillips v. Trull, 11 Johns. 486.

* The law supposes the principal to be in the custody of his bail; and the bail may take him when he pleases, and detain or surrender him into the custody of the sheriff (Anon, 6 Mod. 231; *ex parte* Gibbons, 1 Atk. 238; Anon. 2 Show. 214; Parker v. Bidwell, 3 Conn. 84). This he may do personally, or by an authorized agent (Meddowscroft v. Sutton, 1 Bos. & Pull. 61; Fisher v. Fellows, 5 Esp. 171; Nicolls v. Ingersoll, 7 Johns. 145).

§ 299. When a person is so insane as to be dangerous to the community, any one may arrest and detain him for a reasonable time until proper legal proceedings can be had to confine him; the restraint being demanded both for the safety of the lunatic, and for the preservation of the public peace.¹ But as the right to exercise restraint in such cases has its foundation in a reasonable necessity, it ceases with the necessity.² In *Colby v. Jackson*,³ the following instruction was held correct: That the burden was upon the defendant to prove that the plaintiff was insane, and that it was dangerous for him to be at large; that if this was the case, the defendant might confine him until application could be made to the proper authority, and until a guardian was appointed; that such an application must be made in a reasonable time; that the defendant had no right to confine the plaintiff for an indefinite period, without making application for, and procuring the appointment of a guardian, even if he was dangerous; but that if he was dangerous when confined, and was restored to reason before the defendant could take measures to have a guardian appointed, the defendant would not be liable.*

§ 300. A private person may justify the apprehension of another for felony without warrant, upon a case of strong suspicion, if in fact such a felony was committed, and there is probable ground to suspect that the person arrested committed it;⁴ and the burden of proving that a felony had actually been committed, and the facts relied upon to establish probable cause or reasonable ground for suspicion is

¹ Bro. Abr. *Imprisonment*; *Davis v. Merrill*, 47 N. Hamp. 208.

² *Look v. Dean*, 108 Mass. 116.

³ *Supra*.

⁴ *Reuck v. McGregor*, 3 Vroom, 70; *post*, § 310.

* The report of the commissioners on lunacy in England, made in 1849—a board of eminent men, at the head of whom stood Lord Ashley, a learned jurist—closes with the statement that a rule had been recently adopted, in many of the large asylums in England, which proved satisfactory to the friends of the insane and the public, that no person could be admitted into any lunatic asylum without a certificate of his insanity signed by two physicians within seven days previous to his admission, stating also the facts on which their opinion was founded.

upon the defendant.¹ Sir Edward Coke says: "If treason or felony be done, and one hath just cause of suspicion, this is a good cause and warrant in law for him to arrest any man; but he must show in certainty the cause of his suspicion, and whether the suspicion shall be just or lawful shall be determined by the justices in an action for false imprisonment brought by the party grieved, or upon a *habeas corpus*."² In *Allen v. Wright*,³ the justification of an arrest by a private person was made to depend, first, on the fact that a felony had actually been committed; and, second, that the circumstances were such that a reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. And in *Holley v. Mix*,⁴ the foregoing principles were distinctly affirmed. In general, the felony which will justify an arrest by a private person, under the circumstances above stated, must be an offense that may be tried by the courts of the State in which the arrest is made. If it be committed in a foreign State, and be triable there only, it will not justify such arrest. There may be a single exception to this rule in the case of the arrest of a person charged with the commission of a felony in a foreign State or country for the purpose of detaining him to await a requisition upon the governor of the State in which the arrest is made for his extradition, when such arrest is necessary to prevent his escape.⁵ But the arrest of a person by a private individual without warrant, made for the purpose of forcibly abducting the arrested person from the State, followed immediately by such abduction, would constitute a criminal offense of a high grade at common law.⁶ *

¹ *Samuel v. Payne*, Doug. 359; *Hall v. Booth*, 3 Nev. & Man. 316; *Hale's Pl. Cr.* 72; 1 *Chit. Cr. L.* 15; *Hobbs v. Branscomb*, 3 Camp. 420; *West v. Baxendale*, 9 Com. Bench R. 141; *Burns v. Erben*, 40 N. Y. 463; *Brown v. Chadsey*, 39 Barb. 253.

² Coke, 2 Inst. 52. And see *Davis v. Russell*, 5 Bing. 354; 2 M. & P. 590.

³ 8 Car. & P. 522.

⁴ 3 Wend. 350.

⁵ *Mandeville v. Guernsey*, 51 Barb. 99; *post*, § 327.

⁶ *Ibid*.

* Punishable in New York by imprisonment in a State prison not exceeding ten years (*Rev. Sts. of N. Y.* 5th ed. v. 3, p. 943, § 30). Where the sheriff of Tioga County, Pennsylvania, under a bench warrant issued to him as such sheriff,

3. *Private person causing arrest.*

§ 301. One who maliciously causes an illegal arrest, is liable for false imprisonment,¹ though not present when the arrest is made.² * Liability for an unlawful arrest has even been extended to a case where the defendant in causing the arrest acted under duress. In Kentucky, in an action for causing the arrest and imprisonment of the plaintiff, it was held that the circumstance, that certain statements made by the defendant, which occasioned the arrest of the plaintiff, were made under military compulsion, was no justification, if the defendant knew that the statements were false, and meant thereby to effect the arrest of the plaintiff.³

§ 302. Although the making of an affidavit, upon which the plaintiff was unlawfully arrested, will not render the defendant liable, if he made it without knowing or having any intention, that it should be so used; yet, if the imprisonment be the necessary or probable consequence of orders given by the defendant, he will be liable therefor, although he did not directly order it, or contemplate the possibility of its occurrence.⁴ Where therefore, in an action

upon an indictment found in that county, arrested a person in the State of New York and carried him beyond its boundaries, it was held that, in respect to those acts, he was to be treated as a private person acting without legal process (*Man-deville v. Guernsey, supra*).

There are some cases in which the existence of reasonable ground of suspicion is spoken of as a defense in actions for false imprisonment. It will, however be found that these cases turn upon the authority given to magistrates in particular instances to arrest upon suspicion merely, and in which, therefore, a reasonable suspicion is a sufficient authority and justification for an arrest; or else they are cases in which the actual commission of a felony was first proved, and the case turned upon the ground for suspecting the person arrested.

¹ *Maher v. Ashmead*, 30 Penn. St. R. 344; *Baird v. Householder*, 32 Ib. 168; *Sullivan v. Jones*, 2 Gray, 570.

² *Clifton v. Grayson*, 2 Stew. 412; *Cole v. Radcliff*, 4 W. Va. 332.

³ *Huggins v. Toler*, 1 Bush, Ky. 192.

⁴ *Roth v. Smith*, 41 Ill. 314.

* A landlord charged his tenant with taking and carrying away some oat straw, on which charge a criminal warrant was issued, and the tenant arrested and bound over for trial. It was held that the proper remedy of the tenant was trespass, and not case (*Baird v. Householder*, 32 Penn. St. R. 168).

A person who, during the late civil war, joined a gang of rebel scouts that was taking to prison a loyal man unlawfully arrested, encouraged their acts, and abused him, was held guilty of false imprisonment (*Ruffner v. Williams*, 3 W. Va. 243).

for assault and false imprisonment, it appeared that the defendant was Lieutenant Governor of the Fortress of Gibraltar, and wishing to obtain possession of General Torrijos, a Spanish refugee, whom he thought was harbored in the house of the plaintiff, an English merchant residing at Gibraltar, he placed a part of the military force of the garrison under the command of his military secretary, who ordered them to surround the plaintiff's house, and in the course of their duty one of the soldiers prevented the plaintiff's egress; it was held that there was sufficient evidence to go to the jury that the various proceedings were under the direction and carried on by the authority of the commandant of the garrison; that the soldiers being directed to search for General Torrijos, whose person they did not know, the governor's military secretary in command of them was only carrying out his orders in directing them to prevent all persons from leaving the house; and that the governor's general orders made him liable for this particular act.¹

§ 303. An action for false imprisonment will lie when a warrant of arrest has been issued upon an insufficient affidavit.² Accordingly, where in an action for an unlawful arrest, it appeared that the defendant having commenced an action of tort against the plaintiff, caused him to be arrested and committed to jail, without having previously made the affidavit required by the statute; it was held that the present action would well lie, the illegality of the arrest not depending upon the question whether the suit was malicious and without probable cause, but upon the want of the required preliminary oath that the cause of action was just and true.³ A notable example of the rule under consideration is fur-

¹ Glynn v. Houston, 2 M. & G. 337; 2 Scott N. R. 548.

² Vredenburg v. Hendricks, 17 Barb. 179; Collamer v. Elmore, cited by Willard, J., in Mosher v. The People, 5 Barb. 575. And see Prosser v. Secor, 5 Barb. 607; Moore v. Watts, Breese, 18.

³ Cody v. Adams, 7 Gray, 59; St. of Mass. of 1852, ch. 312, and of 1854, ch. 63.

nished in *Smith v. Bouchier*.¹ In that case the vice-chancellor of the University of Oxford, the judge and jailer were also defendants. The question arose upon a custom that a plaintiff making oath that he has a personal action against any person within the precincts of the university, and that he believes the defendant will not appear, but run away, the judge may award a warrant to arrest him and detain him until security is given for answering the complaint. On the 7th of August, 1731, the defendant Bouchier, having the privilege of the university, made a complaint to the defendant Shippen, the vice-chancellor, of a personal action against the plaintiff, to his damage £1,000, according to his estimation, and that he suspected that the plaintiff would run away; which being sworn to, a warrant was granted to the other defendants, who arrested the plaintiff and kept him in prison eight days for want of sureties. It will be observed that in the foregoing case, the requisite was, that the plaintiff should swear his *belief* that the defendant would run away; whereas, the oath was, that he *suspected*. The court held that it was necessary to give jurisdiction, that he should swear to his *belief*; and because he did not, all that was done was *coram non judice* and void. The vice-chancellor, judge, officer and party, were therefore all held liable for trespass and false imprisonment.

§ 304. The party against whose body a writ has been issued, has a right to know, on application to the magistrate who issued it, whether an affidavit has been duly filed, and if so, an opportunity to ascertain whether it is sufficient to justify the arrest. In *Whitcomb v. Cook*,² which was an action for false imprisonment, it appeared that the plaintiff was arrested and imprisoned upon a writ in favor of the defendant against him, issued by a justice of the peace. The only question in the case, was whether an affidavit had been

¹ 2 Stra. 993. Referred to by Reeve, Ch. J., in *Grumon v. Raymond*, 1 Conn. 40.

² 39 Vt. 585. And see *Parkhurst v. Pearsons*, 30 Vt. 705; *Phillips v. Wood*, 31 Ib. 322.

filed with the magistrate issuing the writ, according to the requirements of the statute. It appeared that the defendant went to his attorney to get a writ against the body of the plaintiff; that the attorney had a blank justice's writ that, had been signed by the magistrate, which he had filled out in proper form, and had also made the necessary affidavit, which was signed and sworn to by the defendant; that they then went to the office of the magistrate to file the affidavit; that finding the office locked, and the magistrate absent, the attorney slipped the affidavit under the door of the office. It further appeared that when the affidavit was so put under the office door of the magistrate, he was absent from the county, and had been for several days, and did not return until a day or two thereafter, when he found the affidavit on the floor of his office, which was the first knowledge he had of it, or of the issuing of the writ. The county court before which the cause was tried, charged the jury that the depositing of the affidavit in the magistrate's office in the manner and under the circumstances above stated, was not such a filing of it as was required by the statute, or as would justify the plaintiff's arrest; and a verdict having been found for the plaintiff, it was sustained.

§ 305. The causing another to be arrested on void process is false imprisonment.¹ And the same is true where, although the process is valid, the wrong person is caused to be arrested under it. To an action for false imprisonment the defendant pleaded a justification under the county court act;² that the defendant had caused to be entered in the said court a plaint against the now plaintiff, and had sued out a summons against the now plaintiff, whereupon judgment was given for the now defendant, and that afterward the defendant had sued out another summons against the now plaintiff, and that subsequently an order was made that

¹ Luddington v. Peck, 2 Conn. 700; Allen v. Greenlee, 2 Dev. 370; Price v. Graham, 3 Jones L. N. C. 545.

² 9 & 10 Vict. c. 95.

the now plaintiff should be committed, &c. The evidence was, that the defendant having a debt due from A., made a plaint in the county court against A. by name, and having sued out a summons against A. by name, procured an order for the committal of A. by name, and that all of these different writs and orders were served upon the plaintiff, and the plaintiff was eventually taken and imprisoned by direction of the defendant under the supposition that he was A., and that the plaintiff, who took no notice of the process served upon him, never represented himself as A. It was held that the plea was not supported by the evidence and that the defendant was liable.¹

§ 306. Where a party lays a complaint before a magistrate on a subject-matter over which the latter has a general jurisdiction, and a warrant is issued upon which the party charged is arrested, the person who made the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.² * It is for

¹ Walley v. McConnell, 14 Jur. 193; 19 L. J. Q. B. 162; s. p. Aaron v. Alexander, 3 Camp. 35.

² Brown v. Chapman, 6 C. B. 365; West v. Smallwood, 3 Mees. & W. 418; 6 Dowl. P. C. 580.

* There is a class of cases in which officers having a peculiar and limited jurisdiction to issue process of a special nature in certain cases, having arrested individuals by such process in cases not within such authority or jurisdiction, both the officers and the parties obtaining the process have been held liable for false imprisonment. Thus, in Curry v. Pringle, 11 Johns. 444, the defendant procured from a justice a warrant instead of a summons, without any oath of the facts which would authorize the justice to issue a warrant, and when the plaintiff was not liable to arrest under the statute. So in Bissell v. Gold, 1 Wend. 210, and Rogers v. Mulliner, 6 Ib. 597. But these were instances where the jurisdiction of the officer to issue such a process was special, and confined to cases which were brought within the statute creating it, and where no steps being taken to give or to show such a jurisdiction, the proceedings were without any authority or color of justification. Vandenberg v. Hendricks, 17 Barb. 179, was a case of a similar nature against a defendant who had taken out a warrant under the non-imprisonment or fraudulent debtor act upon an affidavit which was insufficient to give the officer jurisdiction or authority to act. These cases are distinguishable from Von Latham v. Libby, *supra*, because in the latter the magistrate had a general jurisdiction of the subject-matter, to wit, arrests of persons charged with crimes, and of the person of the accused. Where a person brings an action before a justice of the peace on which the defendant is arrested and held to bail, the plaintiff is not liable in trespass for an assault and battery and false imprisonment, because owing to the absence of the justice at the return day the writ was not entered (Shaw v. Reed, 16 Mass. 450). By the court: "Trespass does not lie in this case, for the writ being good at the time it was served, the arrest was

the magistrate to determine whether sufficient grounds exist in law and fact to arrest a person charged by another with a criminal offense, and the party who has merely stated the case to the magistrate obviously cannot be a trespasser, although the arrest be wholly unjustifiable.¹ * The plaintiff voluntarily went before a police magistrate to meet a charge of embezzlement which was there about to be made against him by the defendant. The magistrate declining to entertain the matter unless a charge was formally made, the defendant said: "Well, then, I charge him with embezzling 30s." The plaintiff was then ordered by one of the constables in attendance to go into the dock, the charge was gone into, and the plaintiff held to bail. It was held that the act of the defendant amounted to no more than calling upon the magistrate to exercise his jurisdiction, and consequently that he was not liable for the imprisonment of the plaintiff.² So

not tortious. The justice had jurisdiction of the cause, and it was only by reason of an event subsequent to the service of the writ that it became inoperative. The plaintiff's remedy is by an action of the case against the defendant, if the justice's absence arose from his negligence, or against the justice, if he was notified of the process, and voluntarily or negligently absented himself."

¹ Von Latham v. Libby, 38 Barb. 339. See *post*, § 334.

² Brown v. Chapman, 6 C. B. 365; 12 Jur. 799; 17 L. J. 329.

* In this case, the facts were as follows: Libby was the owner of a house and lot in Brooklyn, and Rowan his agent. Rowan made an affidavit before a police magistrate that the plaintiff had unlawfully intruded into and taken possession of the house owned by Libby without his authority. Upon this affidavit the magistrate issued a warrant reciting the charge and commanding the arrest of the plaintiff to answer it as a violation of the statute in such case. The plaintiff was arrested, pleaded to the charge, and was suffered to go upon his own promise to appear, Rowan appearing against him. The case was adjourned three times, and upon the last hearing, Rowan not appearing, the complaint was dismissed and the plaintiff discharged. The statute under which the proceedings against the plaintiff were taken provided, among other things, that any person who should thereafter intrude upon any lot or piece of land situate within the bounds of any incorporated city or village without the consent of the owner should be deemed guilty of a misdemeanor. It was not denied that the magistrate to whom the complaint was made had general criminal jurisdiction to issue process for the arrest of persons charged with any crime or misdemeanor of whatever degree; nor that he had jurisdiction to try and to convict the plaintiff, if he were guilty, of an offense under the foregoing statute. The ground upon which the defendant's complaint was dismissed was, that the plaintiff was charged with intruding into a *house* and not upon a *lot of land*, and that Libby was not stated in the complaint or warrant to be the owner of any lot or piece of land. It was therefore contended that neither the affidavit nor the warrant showed the commission of any offense by the plaintiff, and for that reason, at the trial in the city court of Brooklyn, the defendants were held liable for false imprisonment in the plaintiff's arrest. The Supreme Court, however, set the verdict aside.

likewise, where it appeared that the plaintiff was given into custody by the defendant on a charge of stealing, and was taken before a magistrate, who, after hearing the evidence of the defendant in support of the charge, remanded him, it was held, that the remand being the act of the magistrate the defendant was only liable in damages for the trespass and imprisonment in taking the plaintiff before the magistrate.¹ In another case, the defendant gave information before a magistrate, upon which the plaintiff was taken up on a warrant. After the charge was dismissed for the time, and the plaintiff liberated on his promise to appear at a future day, the defendant stated that he had another charge of forgery against the plaintiff, who was retiring, but was again put to the bar. It was held that trespass would not lie.² *

§ 307. In the case of an arrest upon valid process issued by a competent tribunal having jurisdiction, there is no trespass, and false imprisonment will not lie, even though such arrest be maliciously procured by the prosecutor without probable cause.³ † But if a person be arrested on process which is afterward vacated or superseded, he may maintain trespass, although the party causing the arrest was not actuated by any malicious or unjust motives; because the process itself has become a nullity, and the arrest therefore unauthorized.⁴ The general rule is, that false imprisonment lies for arrest under process irregularly issued, but not for arrest under process erroneously issued. It seems, however, that the irregularity must have been apparent upon the face of

¹ Lock v. Ashton, 13 Jur. 167; 18 L. J. Q. B. 76.

² Barber v. Rollinson, 1 C. & M. 330.

³ Sleight v. Ogle, 4 E. D. Smith, 445; Burns v. Erben, 1 Robertson, 555; s. c. 40 N. Y. 463.

⁴ Hayden v. Shed, 11 Mass. 500.

* But the rule is strict that in a court of special and limited jurisdiction the party becomes a trespasser who extends the power of the court to a case to which it cannot lawfully be extended (Curry v. Pringle, 11 Johns. 444).

† If one knowing that he has no cause of action or complaint, cause another to be arrested, the latter may maintain an action upon the case for this injury, although the whole proceedings are perfectly regular and legal in point of form. But he could not, in such a case, maintain trespass.

the process itself, or upon inspection of the record.^{1*} There is an important distinction between erroneous process and irregular process. The first, is the act of the court; and even after it has been set aside or reversed, whatever was done under it while in force, may be justified. But irregular process is the act of the prosecutor, and when once set aside, is considered as having been a nullity from the beginning, and forms no justification to him for anything done under it. In some cases, irregularity of process is waived by the party complaining of it. In other cases, irregularity renders the process void and cannot be waived; as when a writ has been issued on Sunday, or the irregularity consists in a departure from a rule of law founded on public policy. In some instances process is, on the face of it, to all intents and purposes, a nullity, as where it issues in a case plainly out of the jurisdiction of the court or magistrate issuing it. But the validity of the process of a court, unless it appear upon the face of it to be an absolute nullity, cannot be called in question collaterally, until it has been vacated or set aside by the court, or abandoned absolutely by the party who sued it out.^{2†}

§ 308. A person who sues out and delivers to an officer valid process, is not responsible for the irregularity of the officer in executing the same, unless it appear affirmatively that the officer acted under his orders when he committed the trespass. In *Adams v. Freeman*,³ the plaintiff was attached and imprisoned under the statute for refusing or neglecting

¹ *Reynolds v. Corp*, 3 Caines, 267.

² *Blanchard v. Goss*, 2 N. Hamp. 491, and cases cited.

³ 9 Johns. 117.

* In *Reynolds v. Corp*, *supra*, the question arose whether an action of trespass would lie where the judgment debtor had been discharged from custody by *supersedeas*, for want of being charged in execution in due time; and if it would, then whether the plaintiff could sue so long as the award of the execution remained good, and had never been set aside for irregularity. The court below having held the affirmative, the Supreme Court set the verdict aside.

† Where a complaint for crime is dismissed by the magistrate in consequence of the complainant not appearing to prosecute at the time to which the case is adjourned, this is a sufficient termination of the prosecution for the purposes of an action for false imprisonment (*Fay v. O'Neill*, 36 N. Y. R. 11).

to perform an award; the statute making the party in such case, "Subject to all the penalties of contemning a rule of court." The irregularity complained of by the plaintiff was that he was arrested on the attachment on the 31st of May, being after the return day. The attachment was returnable on the 29th of May, and on that day the defendant averred that he delivered the process to the sheriff. It was lawful for the sheriff to arrest the defendant on the return day, and the defendant gave no direction to have him arrested afterwards. It did not appear that the defendant knew at the time the plaintiff was detained a prisoner that he had been arrested after the return day. The court, in directing judgment to be entered for the defendant, remarked that the trespass, if any, was committed by the sheriff, and not by the defendant.

§ 309. With reference to the liability of a married woman, it may be stated that coercion of the wife, which is supposed to exist in all cases of tort committed in the presence or by direction of the husband, is but a presumption of law, and like all other presumptions, may be repelled by proof. Where in an action against a husband and wife, for the wife's maliciously procuring the arrest and imprisonment of the plaintiff, an appeal having been taken by the defendants from a judgment rendered against them on the report of a referee, it was held that as the testimony appeared to have been sufficient to have justified the referee in concluding that the wrongful act of the wife was voluntary on her part, and was her individual act, and although in some respects done in the presence and company of her husband, yet not done by his command or coercion, it must be assumed that the referee found as matter of fact, from the evidence, that the legal presumption of coercion of the wife, had been repelled by proof.¹*

¹ Cassin v. Delaney, 1 Daly, 224.

* The judgment in this case was, however, reversed by the Court of Appeals, on the ground that testimony offered by the defendants to show that the acts charged were done by the direction of the husband, was excluded (38 N. Y. 178).

§ 310. Where, in an action for causing the plaintiff's arrest without process, it appears that a felony having been committed, the defendant did not adopt the usual and more prudent course of having an investigation by a magistrate, it is incumbent on him to make out to the entire satisfaction of the jury not only that a felony has been committed, but that the circumstances of the case were such that a reasonable person, acting without passion or prejudice, would fairly have suspected the plaintiff of being the one who had committed it.¹ * In an action for false imprisonment the defendant pleaded that his goods had been stolen, and that, having cause to suspect the plaintiff of the felony, he gave her into custody. The plea stated several grounds of suspicion. The plaintiff called in a policeman to prove that the defendant directed him to take the plaintiff into custody. The policeman, in his cross examination, said that at the same time and in the presence of the plaintiff, the defendant stated that the goods had been stolen, and also stated some of the grounds of suspicion mentioned in the plea. It was held that this was evidence for the jury to consider, and from which they might find that the felony had been committed, and that the defendant had good cause to suspect the plaintiff if this evidence satisfied them that the facts were really so.² † In a case in New York, it appeared that in pur-

¹ Allen v. Wright, 8 Car. & P. 522; *ante*, § 300.

² Williams v. Crosswell, 2 Car. & K. 422.

* Allen v. Wright, *supra*, was an action for false imprisonment in which the defendant justified on the ground that the plaintiff had been his lodger, and after she had left her apartments, he discovered that some feathers were missing from a bed which she had occupied, and he suspecting her to be the person that had stolen them, caused her to be arrested. It appeared that the defendant took a policeman to the new lodging of the plaintiff, a few days after she had left his house, and had her arrested and taken to the station house, and that the next day she was examined before the magistrate and discharged. A verdict was found for the plaintiff.

† It was held in Williams v. Crosswell, *supra*, that although the plea ought to set out the defendant's grounds of suspicion, yet that he would be entitled to a verdict without proof of the whole of them, if he proved that a felony was in fact committed, and established so much of the grounds of suspicion as satisfied the jury that he had reasonable cause to suspect the plaintiff.

Where the defendant caused the plaintiff to be arrested for stealing fat, and there was no legal evidence of the charge, but the defendant honestly believed

suance of information given by the defendant, a police officer, accompanied by the defendant, arrested the plaintiff without warrant, took her to the police station, where she was detained a few minutes, and after some conversation with the officer in charge, she was permitted to return to her residence. A felony had been committed that evening at the house of the defendant's father. The plaintiff had visited the house that evening, and according to the information on which the defendant acted, was the only person not a member of the family who had been in the basement. Silver had been stolen from the basement. It was there when the plaintiff entered, and until after eight o'clock; and it was missed very shortly after she left the house. The inquiry in the case was whether within the rule with respect to arrests made or aided by private persons, the plaintiff was entitled to recover. It was held that she was not; but that as a felony had in fact been committed, the circumstances justified the suspicion which led to her arrest.¹ The defendant is answerable for all of the ordinary acts of precaution on the part of the policeman to whom he has given the plaintiff in custody, on a charge of felony, though more severity may have been employed than the occasion required.²

§ 311. If the act of the party whose arrest has been caused, be not punishable criminally, nor likely to occasion a breach of the peace, the person giving him in custody will be liable. Where, therefore, in an action for false imprisonment, it appeared that the plaintiff was supplied with certain articles of food at the defendant's eating saloon, and received a check indicating the amount to be paid at the bar, which check, it was alleged, he kept, and substituted in its place one which he had in his possession for a much smaller amount, which was taken as the true voucher, and the amount of which only he paid, it was held that however

that his fat had been stolen, and that the plaintiff had stolen it, and there was reasonable ground for his belief, it was held that the grounds of suspicion were admissible in mitigation of damages (*Chinn v. Morris*, 2 C. & P. 361).

¹ *Burns v. Erben*, 40 N. Y. 463.

² *Edgill v. Francis*, 4 Jur. 365.

reprehensible or contemptible such an act might have been, it was not one for which he could be punished criminally, nor was its immediate tendency to provoke a breach of the peace; and that as the defendant directed a police officer to take the plaintiff into custody, and he was arrested without warrant, the defendant, as a party assisting therein, was liable.¹ So likewise, proof of annoyance and disturbance by a person present at a meeting, such as crying "Hear, hear," putting questions to a speaker, and making observations on his statement, will not justify the chairman of the meeting in giving such person in charge to the police. In order to justify such a course, it must be shown that what was done amounted to a breach of the peace.^{2*}

§ 312. If a person tell a policeman to take charge of another, it is the same as his telling the policeman to take the other into custody, and is sufficient to support an action for false imprisonment.³ But a private person incurs no liability by merely communicating facts or circumstances of suspicion to an officer, leaving him to act on his own judgment and responsibility.⁴ Accordingly, where in an action for false imprisonment, it appeared that a felony having been committed in the house of the defendant, he sent for the police, complained of the robbery, and stated various circumstances of suspicion which had come to his knowledge, and the policeman having investigated those circumstances, on his own authority arrested the plaintiff and took him to a police station, and at the same time requested the defend-

¹ Boyleston v. Kerr, 2 Daly, 220.

² Wooding v. Oxley, 9 Car. & P. 1.

³ Wheeler v. Whiting, 9 Car. & P. 262.

⁴ Brown v. Chadsey, 39 Barb. 253.

* The plaintiff having brought trespass for being taken into custody upon a charge of doing malicious damage to a house of which he himself was tenant, by order of the defendant, who was the attorney to the mortgagee of the house, and the objection taken that no notice of action had been given pursuant to the statute, the judge asked the jury whether the defendant acted *bona fide* or only colorably in giving the plaintiff into charge. Held a misdirection, as the jury ought to have been asked whether the defendant was servant of, or had authority from the mortgagee to do the act complained of, or reasonably believed himself to be in either of those positions (Kine v. Evershed, 11 Jur. 673; 16 L. J. 271).

ant to come to the station and sign the charge sheet, which he did, accusing the plaintiff of the felony; it was held that as charging a person with an offense was a different thing from giving him into custody, the defendant was not liable. The arrest and detention of the plaintiff were the acts of the police officer; and the defendant did nothing more than he was under the circumstances bound to do, viz., sign the charge sheet. He might have been liable if he had acted *mala fide*, but not otherwise.¹ If, however, the defendant had given the plaintiff in charge, or directed the policeman to take him into custody, he would have been answerable in damages for the imprisonment; and the signing of the charge sheet would have been *prima facie* evidence that the defendant ordered and directed the arrest.²

§ 313. A person is not liable for false imprisonment who, seeing a man in custody of an officer for a supposed offense, points out another as the real criminal, without directing the officer to take that one into custody.³* It is however otherwise, if he cause the arrest of an innocent party by voluntarily giving information which he supposed at the time to be true, but which turns out to be false. In an action for false imprisonment, it appeared that the defendant had seen two young men steal some boots from a boot maker's window and run off, and that the defendant followed and pointed out the plaintiff as one of the young men to a policeman, who took the plaintiff into custody. The defendant did not give any charge to the policeman. A verdict having been found for the plaintiff, the court refused a new trial.⁴

¹ Grinham v. Willey, 4 H. & N. 496; L. J. Exch. 242; Brown v. Chapman, 6 C. B. 365.

² Hopkins v. Crowe, 4 Ad. & E. 774; Wheeler v. Whiting, 9 C. & P. 262; Warner v. Riddiford, 4 C. B. N. S. 200; Morgan v. Hughes, 2 T. R. 231; Stonehouse v. Elliott, 6 Ib. 315; Harris v. Dignum, 29 L. J. Exch. 23.

³ Gosden v. Elfick, 13 Jur. 989.

⁴ Hudson v. Howard, 1 Jur. 658.

* Where the complainant accompanied the constable charged with the execution of the warrant, and pointed out to him the person to be arrested, it was held that this was evidence to go to the jury of a participation in the arrest (West v. Smallwood, 3 M. & W. 418; 6 Dowl. P. C. 580; 2 Jur. 328).

§ 314. When in an action for causing a person to be taken to a police station, it appears that the going proceeded originally from the plaintiff's own will, the defendant will be entitled to a verdict on either "not guilty" or "leave and license" pleaded. But the plaintiff will not be deprived of his right to recover damages if it appear that being acted upon by the defendant's having made a charge of felony against him in the presence of a policeman, he went voluntarily with the policeman to the station house for the purpose of meeting the charge.¹

§ 315. Where a charge for assault and false imprisonment is sought to be excused under the plea that the plaintiff unlawfully entered the defendant's house, and would not leave when requested, whereupon the defendant sent for a police officer and gave the plaintiff into custody, it must be alleged and proved, either that there was a breach of the peace at the time, or that a breach of the peace had been committed, and that there was reasonable ground for apprehending that it would be renewed.² Trespass for assault and false imprisonment, and taking the plaintiff to a police station. Plea that the defendant was possessed of a dwelling-house, and that the plaintiff entered the dwelling-house, and then and there insulted, abused, and ill treated the defendant and his servants in the dwelling-house, and greatly disturbed them in the peaceable possession thereof, in breach of the peace; whereupon the defendant requested the plaintiff to depart, which he refused to do, and continued in the house, making the said disturbance and affray therein; that thereupon the defendant, in order to preserve the peace and restore good order in the house, gave charge of the plaintiff to a certain policeman, and requested the policeman to take the plaintiff into his custody, to be dealt with according to law; and that the policeman, at such request of the defendant, gently laid his hands on the plaintiff for the cause aforesaid,

¹ *Peters v. Stanway*, 6 Car. & P. 737.

² *Grant v. Moser*, 5 M. & Gr. 123; *Price v. Seeley*, 10 Cl. & Fin. 28.

and took him into custody. It was proved that the plaintiff entered the defendant's shop to buy an article, when a dispute arose between the plaintiff and the defendant's shopman; that the plaintiff refusing, on request, to go out of the shop, the shopman endeavored to turn him out, and an affray ensued between them; that the defendant went into the shop during the affray, which continued for a short time after he came; that the defendant then requested the plaintiff to leave the shop quietly, and that he refusing to do so, the defendant gave him in charge to a policeman, who took him to a station house. It was held that the defendant was justified, under the circumstances, in giving the plaintiff in charge, in order to prevent a renewal of the affray.¹ *

§ 316. Where a merchant employs a clerk to sell goods for him in his absence, or a superintendent to take the general charge and management of his business at a particular store, he does not thereby confer authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen and secreted about his person, any of the goods kept in such store. It cannot be presumed that a master by intrusting a servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection, that he could not lawfully do himself, if present. The master would not, if present, be justified in arresting, detaining and searching a person upon suspicion, however strong, of having stolen his goods, and secreted them upon his person. The authority of the merchant to his clerk or superintendent, could not therefore be implied from his employment.² † But it follows from

¹ Timothy v. Simpson, 1 C. M. & R. 757; 5 Tyr. 244; 6 Car. & P. 499; see Reece v. Taylor, 4 Nev. & M. 469; 1 Har. & W. 15; Atkinson v. Warne, 1 C. M. & R. 827; 5 Tyr. 481; 3 Dowl. 483.

² Mali v. Lord, 39 N. Y. 381.

* The rule stated in the text will be found illustrated in the following cases: Green v. Bartram, 4 Car. & P. 308; Rose v. Wilson, 8 Moore, 362; 1 Bing. 353; Cohen v. Huskisson, 2 Mees. & W. 477; Baynes v. Brewster, 2 Ad. & E. N. S. 375; Grant v. Moser, 2 Dowl. N. S. 923; 6 Scott, N. R. 46; Simmons v. Millingen, 2 C. B. 524.

† A town is not liable for the unauthorized, illegal, and oppressive acts of a

the rule as to the liability of the master who commands, and the servant who commits a trespass, that where an arrest has been made under process, which is afterward set aside for irregularity, both the attorney who sued out the process, and the client who set the attorney in motion, may be prosecuted for the assault and false imprisonment.¹

§ 317. An action may be maintained against a judgment creditor for maliciously, and without reasonable or probable cause, indorsing a writ of *ca. sa.*, issued on a judgment to levy a larger sum than is due, and causing the debtor to be arrested thereunder; and the plaintiff, before bringing the action, need not obtain his discharge from custody.² But where, previous to judgment, the plaintiff paid part of the debt for which he was sued, and afterward judgment was signed, and a *ca. sa.* issued for the whole amount, it was held that no action lay, so long as the judgment stood for the full amount.³ *

§ 318. Where a creditor employs the power of imprisonment given by law for the collection of his judgment debt, to extort other money from the debtor, or to compel him to pay another debt against his will, the creditor will be deemed a trespasser from the beginning.⁴ When the process of law has been abused and prostituted to an illegal purpose, it is

constable in committing a person to prison without a mittimus or warrant of committal (*Board of Trustees v. Schroeder*, 58 Ill. 353).

¹ *Stephens v. Elwall*, 4 M. & S. 261; *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J. Exch. 224.

² *Gilding v. Eyre*, 31 L. J. C. P. 174.

³ *Huffer v. Allen*, L. R. 2 Exch. 15.

⁴ *Breck v. Blanchard*, 2 Fost. 303; *Richardson v. Duncan*, 3 N. Hamp. 508; *Severance v. Kimball*, 8 Ib. 336; *Stoddard agst. Bird*, Kirby R. 65.

* "It would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due upon the judgment, the judgment creditor knowing the sum for which execution is sued out to be excessive, and his motive being to oppress or injure his debtor. The court or judge to whom summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although by the excess the debtor may have suffered a long imprisonment, and have been utterly ruined in his circumstances" (*Lord Campbell, Churchill v. Siggers*, 3 Ell. & Bl. 937; 23 L. J. Q. B. 308; *Jenings v. Florence*, 2 C. B. 467; 26 L. J. C. P. 277).

immaterial whether or not it issued for a just cause of action, or whether or not the suit was legally terminated.¹ On criminal process to remove from New Hampshire a person charged in Massachusetts with obtaining goods by false pretences to that State for trial, it was held that if the party caused the defendant to be arrested, and made use of the process in any manner to compel the defendant to settle or give a note, that was a use of process wholly unauthorized by law, and the note thus procured was void.² The court in this case say: "It is wholly illegal to use the criminal process of the State to extort money, or even to compel the payment of debts. It was not provided for any such purpose. If a creditor is desirous of collecting a demand lawfully due to him, the laws have provided remedies deemed by the legislature suitable and competent for that purpose. If, instead of a resort to such remedies, he attempts to pervert the criminal process of the State, and make it subservient to that object, he may, in thus depriving his debtor of his liberty, make himself liable to damages, and in some instances endanger his own liberty."³*

¹ Granger v. Hill, 5 Sc. 561, 4 B. N. C. 212; Heywood v. Collinge, 9 Ad. & E. 268.

² Shaw v. Spooner, 9 N. Hamp. 197.

³ Referring to Burnham v. Spooner, 10 N. Hamp. R. 532.

* Where a debtor is decoyed by false pretences from the State in which he resides into another State, for the purpose of enabling his creditor to bring an action against him, and on his arrival the suit is commenced, and his body attached, the whole proceeding is a fraud upon the debtor, and void (Hill v. Goodrich, 32 Conn. 588; and see Metcalf v. Clark, 41 Barb. 45; Goupil v. Simonson, 3 Abb. 474; Stein v. Valkenhuisen, Ellis, Black. & Ellis, 65; Williams v. Bacon, 10 Wend. 636; Snelling v. Watrous, 2 Paige, 314). In Hill v. Goodrich, *supra*, the debtor was decoyed from Boston to Hartford by means of two anonymous letters, and by pretences which were admitted to have been false. Ellsworth, J., in delivering the opinion of the court, said: "In a case in Tyler's reports, a debtor was decoyed from the State of Vermont into that of New York, and there sued on a debt barred by the statute of limitations in Vermont. When he got back to Vermont he sued the parties that had decoyed him, and recovered. And I think the decision rests upon high principles of justice. A like case was decided by Judge Thompson, in the United States Circuit Court. The principle of these cases is this: No person has a right thus to decoy another from one place to another to his injury. It is a deceit, and deceit and damage are always a good ground of action. It has been so held ever since the case of Pasley v. Freeman, 3 T. R. 51.

"It was in this case some damage to Hill—the expense of coming—the loss of time; and if he were to sue for damages, he could certainly recover. I leave

4. *Arrest and detention under military order.*

§ 319. In relation to acts affecting military rank or status only, or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere. No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law. Least of all, will the common law undertake to rejudge acts done *flagrante bello* in the face of the enemy. But for the malicious exercise by a military officer of lawful authority, or for acts of a military officer or court in excess of authority, though done in good faith, toward those in the military service, and *a fortiori* toward those who are not, where the civil laws are in full force, the person injured may obtain redress in the ordinary way by suit against the wrong-doer.¹ If, for instance, a military officer should assume jurisdiction over those who were not liable to enrollment, he would transcend his authority, and both he and those who acted under him would be trespassers.² In Massachusetts, where a person who had not enlisted as a soldier was seized and taken against his will into camp, it was held that he might maintain an action for such seizure against the officers and their agents, and prove, in aggravation of damages, the fact of his confinement in the guard tent, and that the defendants were

the fact that he was arrested on his arrival wholly out of the case. Suppose two men combine to send a man to Europe after an estate, and it is all a deception, can he not recover damages for it? I cannot entertain any doubt upon the point. It comes then to this, whether a man may be allured by fraud from his own State to another jurisdiction, and there be sued. I think he cannot be. You cannot do a wrong, and on that build a right. It is the same thing in principle as if Hill had been brought here by force. I think if there was no combination, but a single creditor should write to a debtor in another State, and by a fraud get him into the State, he would be liable in damages; and that if there was a combination for the purpose, it would be a crime."

The plaintiff being in the custody of the marshal of the King's Bench, was charged in execution on an attachment which the defendant had caused to be issued. It was held (Lord Abinger, C. B., dissenting), that there was *prima facie* an act of trespass, for which an action was maintainable, and that if the defendant were justified under the writ, he ought to plead that matter specially (Bryant v. Clutton, 5 Dowl. P. C. 66; 2 Gale, 50.)

¹ Tyler v. Pomeroy, 8 Allen, 480, per Gray, J., and cases cited.

² Darling v. Bowen, 10 Vt. 148.

liable both for the bodily suffering and for the injury to the plaintiff's feelings occasioned by the wrongful act.^{1*} If the authority be usurped, all acts done under it will, of course, be void, and the party exercising them liable to prosecution. In *French v. White*,² the following instruction was held correct: "If the jury believe, from the evidence, that the defendant assuming to act as an officer of the so-called Confederate government, and at the time of committing the wrong complained of was engaged in an effort to subvert the government, and that in pursuance of such illegal and treasonable purpose, and as a means to its accomplishment, arrested and imprisoned the plaintiff, the law would imply malice."

§ 320. In passing upon the legality of acts done by military officers in the discharge of their duty, in a period of public peril, great latitude ought to be allowed.³ Where a military officer, stationed on the lines of the territory, in time of war, seized the person of an individual who was transporting property towards the enemy's province, under circumstances to create a reasonable suspicion that he was about to transport the same to the enemy, and immediately delivered him over to his superior officer, the court held that the officer was justified.⁴ During the late rebellion it was held, in Maine, that, as it was obvious that the provost marshals in the several congressional districts, could not attend to their duties in arresting deserters, and in the drafting of

¹ *Tyler v. Pomeroy*, *supra*; *Stowe v. Heywood*, 7 Allen, 122, 123, and cases cited.

² 4 W. Va. 170.

³ *Wall v. McNamara*, Michaelmas Term, 1779, per Lord Mansfield.

⁴ *Clow agst. Wright*, Brayt. 118.

* The term "bodily infirmity," in the statute (of Vermont), exempting from military duty, imports an absence of those palpable and visible defects which evidently incapacitate the person from performing the ordinary duties of a soldier. But of this, the officer must, from the necessity of the case, judge in the first instance, and if he misjudge, the error is to be corrected, not by action of trespass, but in the manner pointed out by the statute (*Darling v. Bowen*, *supra*).

Where, in an action for false imprisonment, it appeared that the plaintiff, who was a soldier, did not return at the expiration of his furlough, it was held, that he was *prima facie* to be deemed a deserter and liable to arrest (*Hickey v. Huse*, 56 Maine, 493).

soldiers without assistants, regard being had to their various and onerous duties, they would have the right, and it would be their duty, to appoint agents or deputies to aid and assist, and those agents or deputies, while acting within the line of their duty, would be entitled to the same protection as their several principals.¹ And in New York, where in an action for imprisonment, it appeared that the defendants were public officers; that they were called to act in perilous, arduous, and difficult times; that the law imposed upon them a public duty for public purposes; that they were invested with legal authority to act, and were liable if they neglected to act in a case where there was sufficient and probable cause; and that the discipline of the army and safety of the government depended upon their fidelity, it was held incumbent upon the court to determine the character of the defendant's acts. The court said, that it would be a reproach to it under such circumstances, if, through timidity or a desire to shirk responsibility, they should leave to the jury the question of probable cause; that it was not only proper, but the duty of courts, to exercise great latitude in the review of the acts of such officers.²

§ 321. Where a person, not subject to the jurisdiction of a court martial, is arrested and detained for trial for an offense not within its jurisdiction, the rights and responsibilities of the officer causing the detention, are governed by the rules of law applicable to courts of special and limited jurisdiction.³

5. *Arrest by officer without warrant.*

§ 322. An officer who has reasonable ground to suspect that a felony has been committed, may detain the person suspected until the matter can be investigated by the proper

¹ Hickey v. Huse, 56 Maine, 493.

² Hawley v. Butler, 54 Barb. 490; s. c. 48 Ib. 101.

³ Smith v. Shaw, 12 Johns. 257.

authorities,¹ although it should afterward appear that the person arrested was innocent of the charge.² The official proclamation of the governor that a felony has been committed, published according to law, would justify the arrest of a person against whom there were reasonable grounds of suspicion. So likewise, where a person accuses another of having robbed him, and requests a constable to arrest the accused, which the constable does without warrant, the constable is not liable because it happens that the charge is false and that no felony has in fact been committed. "It would be most mischievous that the officer should be bound first to try and at his peril exercise his judgment on the truth of the charge. He that makes the charge alone is answerable. The officer does his duty in carrying the accused before a magistrate who is authorized to examine and commit or discharge."³ Lord Hale⁴ says: "If A. be dangerously hurt, and the common voice is that B. hurt him; or, if C. thereupon come to the constable and tell him that B. hurt him, the constable may imprison B. till he knows whether A. lives or dies, and until he can bring him before a justice." It is said by another old authority,⁵ that where in an action against an officer it appears that no felony was committed, the question always turns upon this:—"Was the arrest *bona fide*? Was the act done fairly and in pursuit of an offender, or by design, or malice, or ill-will? * * * * It would be a terrible thing if, under probable cause, an arrest could not be made. * * * * Many an innocent man has and may be taken up upon suspicion, but the mischief and inconvenience to the public in this point of view is comparatively nothing; it is of great consequence to the police or the court." Although

¹ Hawk. P. C. b. 2, ch. 12, 13; 1 Russ. on Cr. 594; Steph. Cr. L. 242; 1 Chit. Cr. L. 15, 17; Beckwith v. Philby, 6 B. & C. 35; 9 D. & R. 487; Lawrence v. Hedger, 3 Taunt. 14; Buckley v. Gross, 32 L. J. Q. B. 129; Allen v. Wright, 8 C. & P. 522; Hall v. Booth, 3 N. & M. 316; Regina v. Tooley, 2 Ld. Raym. 1296; Hobbs v. Brandscomb, 3 Camp. 420; Davis v. Russell, 5 Bing. 354; Cowles v. Dunbar, 2 Car. & P. 565; Burns v. Erben, 40 N. Y. 463.

² Eanes v. The State, 6 Humph. 53.

³ Samuel v. Payne, 1 Doug. 360, per Lord Mansfield.

⁴ P. C. 537.

⁵ 1 Burns' Just. 130; Ledwith v. Catchpole, Cald. Cas. 291.

where A. being liable to arrest, B. represents that he is A., and B is accordingly arrested and has no ground to complain of the imprisonment brought about by his own act, yet after he has given notice that he is not A. he cannot lawfully be detained longer than is required to ascertain which of his statements is true.¹

§ 323. An officer who arrests an innocent party without warrant, having at the time reasonable ground to believe him innocent, will be liable. Where, therefore, a showman told the defendant, a police constable, at a fair, that some harness of his had been stolen a year previously, and that the stolen harness was on the plaintiff's horse, and the constable went to the plaintiff and asked him where he got the harness, and the plaintiff replied that he had bought it of a man he did not know, and had given him a shilling for it, whereupon the constable arrested the plaintiff; but it appeared that the constable had been acquainted with the plaintiff for twenty years as a householder of respectability; it was held that there was no reasonable ground for the arrest, and that the constable was liable in damages for false imprisonment.²

§ 324. Where an assault is committed within view of a constable, he may lawfully arrest the offender at the time, or as soon after as he conveniently can, not only to prevent a breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate,³ and any person standing in his way, with intent to hinder him, may be taken into custody.⁴ So, likewise, a constable may lawfully enter through an unfastened door in which there is a noise amounting to a breach of the peace, and arrest a person engaged in an affray, or in committing an assault in his presence, and detain him a reasonable time to prevent a further assault.⁵

¹ Dunston v. Paterson, 2 C. B. N. S. 495; 26 L. J. C. P. 267.

² Hogg v. Ward, 3 H. & N. 417; 27 L. J. Exch. 443.

³ Reg. v. Light, 27 L. J. M. C. 1.

⁴ Levy v. Edwards, 1 C. & P. 40.

⁵ Com. v. Tobin, 108 Mass. 426; *post*, § 370.

If, however, the disturbance has entirely ceased, the officer and all aiding him in the arrest or detention will be liable.¹ A., a deputy marshal, took B. before C., a mayor who had concurrent jurisdiction with justices of the peace, and told C. that B. had been fighting and disturbing the peace, without specifying when, where, how, or with whom. C. thereupon ordered that B. pay a fine and be imprisoned. B.'s offense was not committed in the presence of either A. or C. In an action by B. against them for false imprisonment, it was held that he was entitled to recover.² The continued wilful and malicious ringing of a door bell tends to a breach of the peace, and if done within view of an officer he may take the offender into custody.^{3 *}

§ 325. An officer, in arresting another without a warrant, should be careful to keep within the authority conferred upon him.† When the law requires that in such case the party arrested shall be immediately and without delay, con-

¹ 1 Hale P. C. 587; 1 East P. C. 303; 1 Chit. Cr. L. 20.

² *Prell v. McDonald*, 7 Kansas, 426.

³ *Grant v. Moser*, 5 M. & G. 123.

* A licensed nightman was arrested by a policeman without a warrant and confined in a station house in Baltimore for violating certain regulations of the board of health in relation to the removal and deposit of nightsoil. The nightman admitted that he knew at the time of his arrest of the order of the board of health designating particular localities for the deposit of the nightsoil, and that he violated the order because it cost him more to take the manure to those places than to the place where he was at the time depositing it. It was not pretended that there was any malice on the part of the policeman, or that the arrest and detention were attended with circumstances of violence or aggravation; and it appeared that the nightman was released without any unnecessary delay, on his own recognizance. It was held that a judgment for false imprisonment could not be sustained (*Mitchell v. Lemon*, 34 Md. 176). When a witness is duly summoned to appear before the grand jury, and he appears, but refuses to be sworn or to answer questions, and accompanies his refusal with profanity and disrespectful conduct toward the jury, they can lawfully direct the officer in attendance upon them to detain the witness in his custody and take him before the court in order to receive its instruction.

† A person cannot lawfully be arrested for the breach of a by-law and taken before a magistrate, unless such a power is expressly given by statute (*Chilton v. Lond. & Croyd. Rail. Co.* 16 M. & W. 212; *Reg. v. Mann*, 23 L. T. R. 12).

Where a by-law imposes restraints beyond what is imposed by the general law of the land, a satisfactory reason must be shown for them, and an express statutory authority for their imposition (*Calder & Hebble Nav. Co. v. Pilling*, 14 M. & W. 76; *Young v. Edwards*, 33 L. J. M. C. 227).

When the two parts of a by-law are entire and distinct from each other, it may be good in part, and bad in part (*Reg. v. Lundie*, 31 L. J. M. C. 157).

veyed before the nearest magistrate, and the officer continues to hold him in custody arbitrarily, and without process of law, he will be liable. In *Green v. Kennedy*,¹ it was proved that the plaintiff was arrested by a police officer without warrant, in the city of New York, and having been taken by him before the defendant who was superintendent of police, the latter ordered the plaintiff to be taken back, and locked up; which was accordingly done, and the plaintiff remained in prison eight days. At the trial at the circuit, a verdict was found in favor of the plaintiff for \$325 damages, and the general term of the Supreme Court refused to disturb it. In *Brock v. Stimson*,² it appeared that the defendant, who was chief of police of the city of Cambridge, found the defendant in a public place intoxicated, disorderly, and disturbing the peace, and detained him at a police station until he became sober, and then discharged him. It was held that as the statute³ directed the officer to take such a person without a warrant, and detain him in some proper place until he had so far recovered as to render it proper to take him before a court of justice, then to take him before some justice of the peace or police court, in the city or town where he had been found, and make a complaint against him for the crime of drunkenness, which the defendant failed to do, he could not justify the arrest, and that his unauthorized discharge of the prisoner, afforded the defendant no protection from liability.

§ 326. An officer who has arrested another without process, or on void process, wrongfully, or on Sunday, when that is forbidden, or in any way not authorized by law, cannot detain him on valid process until he has restored such party to the condition he was in at the time of his arrest.*

¹ 46 Barb. 16; and see Bacon's Abr. Tit. Trespass, G; *Coats v. Darby*, 2 N. Y. 517.

² 108 Mass. 520.

³ Of 1869, ch. 415, p. 43.

* The time from the rising to the setting of the sun was by ancient authors called *dies solaris*, and the night *dies lunaris*. The solar day was termed the

The law will not permit him to perpetrate a wrong for the purpose of executing process, nor to use process for the purpose of continuing an imprisonment commenced without authority, and by his wrongful act.¹ Where, therefore, in an action for assault and battery and false imprisonment it appeared that the defendant, who was a sheriff in Pennsylv-

natural day; and the whole twenty-four hours, consisting of the solar day and the night succeeding it, was called the *artificial day*. But afterwards the solar day was termed the artificial day, and the twenty-four hours commencing from the rising of the sun on one day, and continued through the night succeeding, was styled the natural day (Co. Litt. 135 a). Different nations began the day at different times. The Jews, Chaldeans, and Babyloaneans at sunrise; the Umbri, in Italy, at midday; the Egyptians and Romans from midnight.

Fox agst. Abel, 2 Conn. 541, was an action of trespass, charging an assault, battery and false imprisonment. Under the plea of *not guilty* the defendants relied on a justification by the levy of an execution on the body of the plaintiff, which was made Sunday morning, after midnight and before daybreak. The case turned upon the construction of the statute, which enacted that if any civil process should be issued or served on the Sabbath, or Lord's day, it should be void. At the trial in the court below, a verdict was found for the plaintiff under the instruction of the court, that the Lord's day, within the meaning of the statute, extended from the next preceding to the next succeeding midnight, embracing a period of twenty-four hours. The Supreme Court, however, set the verdict aside, a majority of the judges holding that the arrest was lawful (Swift, Ch. J.; Edmond & Barnard, JJ., dissenting).

Shaw v. Dodge, 5 N. Hamp. 462, was an action of trespass for assault and false imprisonment. The defendant set up in defense that he acted under legal process as a collector of taxes. The plaintiff replied that the arrest was made on the 11th of April, which was the Lord's day. On the trial it was proved that the arrest was made some time in the night following the 10th or early in the morning of the 11th. The judge charged the jury that if they believed, from the evidence, that the defendant made the arrest at any time after twelve o'clock in the night following the said 10th day of April, the plaintiff was entitled to recover. A verdict having been found for the plaintiff, the Supreme Court, in refusing a new trial, remarked that as it was to be presumed that the Legislature, when they used the term Lord's day, intended it to be understood in its common acceptation, that is a *civil day*, embracing twenty-four hours, and commencing and ending at midnight, the instruction was correct.

False imprisonment, it is said, will lie for arresting a person on Sunday. But this arises from the words of the statute, which declares the service to be bad, and that the party shall be answerable in the same manner as if he made the arrest without process (Reynolds v. Corp, 3 Caines, 267).

In Swann v. Broome, 3 Burrow, 1595, Lord Mansfield says that the ancient Christians not only allowed all kinds of legal process on Sunday, but held their courts open for the trial of causes down to the beginning of the sixth century; but that afterwards the practice was prohibited by sundry ecclesiastical canons. These canons were received and adopted in England, by their kings, in the time of the Saxons. Edward the Confessor, made a constitution forbidding the holding of courts "on all Sabbath days, after the ninth hour, and the whole day following, until Monday." These canons and constitutions were confirmed by William the Conqueror; and thus, says Lord Mansfield, they became part of the common law of England.

¹ Egginton's Case, 2 Ell. & Bl. 728; Percival v. Stamp, 9 Exch. 171; Hooper v. Lane, 27 L. J. Q. B. 75; 6 H. L. C. 443; Humphrey v. Mitchell, 3 Sc. 51.

nia, arrested the plaintiff in New York, and carried him back to Pennsylvania, and kept him in close confinement there until he was released on bail; it was held that as the arrest was wrongful, the defendant was liable for all the injurious consequences to the plaintiff which resulted directly from the wrongful act; that the imprisonment in Pennsylvania was a continuance of the wrong which was commenced by the unauthorized seizure in New York, and that it was not justified by any process which was insufficient to justify the original arrest.¹ But in North Carolina, where a person was in prison under a void process, and the sheriff, without acquainting his deputy, the jailer, with the fact that he had a valid process ordered him to keep the prisoner, it was held in an action for false imprisonment that the possession by the sheriff of valid process, was a good defense for the acts of his deputy.²

§ 327. Where there is a negligent escape, the officer may retake the party; or if the defendant voluntarily return before suit, it is equivalent to a recaption on fresh pursuit.³ But after a voluntary escape, if the party was in custody on a writ of execution, he cannot be retaken.⁴ Nor can the sheriff of a county in one State lawfully pursue and retake in another State a prisoner who has escaped from his custody.⁵ Each State government owes protection to its citizens and sojourners, and they cannot be forcibly taken out of its jurisdiction without the consent of the constituted authorities. In the second section of the fourth article of the Constitution of the United States, provision is made for the surrender of felons and fugitives from justice; but even this is to be done only on application to the executive.*

¹ *Mandeville v. Guernsey*, 51 Barb. 99; *ante*, § 300.

² *Meeds v. Carver*, 8 Ired. 298.

³ *Butler v. Washburn*, 5 Fost. 251.

⁴ *Ibid.*; and see *Powers v. Wilson*, 7 Cowen, 276; *Little v. N. P. Bank*, 14 Mass. 443; *Poucher v. Holley*, 3 Wend. 184; *Tanner v. Hague*, 7 D. & E. 420; *Gould v. Gould*, 4 N. Hamp. 174.

⁵ *Bromley v. Hutchins*, 8 Vt. 194; *ante*, § 300.

* "If our citizens are subject to be taken by the officers of a neighboring

6. *Requisites of warrant of arrest.*

§ 328. At common law, a warrant may be directed to some indifferent person who is not an officer. But a magistrate ought never to do this, when an officer can be conveniently found to perform the service, for the reason that a private individual cannot be compelled to make service, or be punished in case of refusal. In an early case in Massachusetts, it was held that a warrant addressed to the proper officers, and to an individual by name, who was not an officer, was erroneous, and conferred no authority upon the individual to make the arrest, though a doubt was expressed whether it might not be lawfully done when no officer was at hand to perform the service, and that fact was expressed in the warrant.¹

§ 329. A warrant should contain a command or requirement to the person to whom it is directed to make the arrest. A mere authority in the nature of a license or permission is not sufficient. The direction is an essential part of every warrant. Unless it is directed to the sheriff or the constables

State, they are equally subject to be taken and transported to Louisiana or Missouri. Except in those delegations of power invested in the general government, and those restrictions provided in the United States Constitution, each State is a national sovereignty, and holds the same relation to the other States which it holds to other nations. As the United States Constitution contains no provision on this subject, our citizens are as much subject to the authority and pretended recapture by the officers of England or France as of New York. This suggests consequences entirely at war with all civil liberty, protection, and national independence. We are entirely unprepared to adopt so dangerous and fearful a principle and practice as that for which the defendant contends. It may be true, though not yet so decided, that inasmuch as the bail is the keeper of the principal at his own request, and is said to hold him as by a string, and may generally circumscribe or enlarge his wanderings, and may arrest even after a voluntary enlargement, he might, by virtue of this power and right existing by contract and license between the parties, even arrest in another State. The condition of an officer is entirely different. His power is derived wholly from his official character and his precept, and must, on principle, cease where his official character and precept cease to have validity and jurisdiction. The same may be said of the analogy mistakenly attempted to be drawn from a right acquired to property by contract, or the laws of the country in which it is situate, remaining good elsewhere" (Collamer, J., in *Bromley v. Hutchins*, 8 Vt. 194).

Whether a pauper can be forcibly removed from one town into another in which he has a settlement, except by warrant, *quære* (*Backus v. Dudley*, 3 Conn. 568).

¹ *Com. v. Foster*, 1 Mass. 488.

of the county or town, or some individual officer, or to some individual by name, who is not an officer, it will not answer. In *Abbott v. Booth*,¹ which was an action for assault and battery and false imprisonment, the question was, whether a warrant issued by a justice of the peace against the plaintiff, afforded a justification to the defendant for the arrest and detention of the plaintiff. The defendant was not an officer, and the warrant was not directed to him in the body of it, but "to the sheriff or any constable of the county" in which the magistrate resided. The magistrate, instead of directing it to the defendant by name, and commanding him to execute it, undertook to confer an authority by an indorsement on the back of the warrant, in the nature of a permission or license to make the arrest. The judge at the circuit sustained the objection that a justice of the peace has no power to depute a person not an officer to make an arrest, unless the warrant is directed to such person by name; and a verdict having been found for the plaintiff, the judgment was affirmed on appeal.

§ 330. To justify an arrest, the name of the party to be apprehended must be accurately stated and inserted in the warrant, before it is delivered to the officer.² * If the name is unknown, the warrant may be issued against the party by the best description the nature of the case will allow.³ † But the description must be sensible and intelligible. Thus, a warrant directing the "associates" of persons to be arrested, without mentioning the names of such associates, has been held illegal and void as to them.⁴ And the arrest of a mem-

¹ 51 Barb. 546.

² 2 Hale, 114; Foster, 312; 1 Chitty's Cr. Law, 39; *State v. Weed*, 21 N. Hamp. 262.

³ 1 Hale, 577; 1 Chitty's Cr. Law, 40.

⁴ *Wells v. Jackson*, 3 Munford, 458.

* Where A. is arrested under a warrant, in which he is incorrectly named B., all persons aiding in the arrest are trespassers (*Johnston v. Riley*, 13 Geo. 97).

† A warrant regularly issued against a person whose name is unknown, with a blank left for the name, will justify the arrest of the proper person (*Bailey v. Wiggins*, 5 Harring. 462).

ber of a corporation, on an execution against the "president, directors, and company of the corporation," is a trespass. Such a precept has been characterized as "absurd and impracticable."¹ A general and uncertain description, is insufficient.²

§ 331. Process for the arrest of an individual, must so describe the person intended, that the officer will know who to arrest, and the party, whose liberty is threatened, will know whether he is bound to submit. It is not enough that the person in fact intended was arrested. The mandatory part of the warrant is that which gives it efficacy as a process, and, under that, the officer must justify.³ Therefore, in an action by A. against B., for false imprisonment, B. cannot defend himself under a magistrate's warrant against C., although A. was charged with felony, before the magistrate, and was the person against whom the warrant was intended to issue.⁴ In *Shadgett v. Clipson*,⁵ where *Josiah* was arrested under process against him by the name of *John*, the officer was held liable in an action for false imprisonment. The court said, that process ought to describe the party against whom it is meant to be issued; and that the arrest of one person could not be justified under a writ sued out against another. In *Griswold v. Sedgwick*,⁶ process was issued from a court of equity to attach for contempt, *Samuel*, and was served upon *Daniel*, the person really in contempt, and against whom the order was made. As soon as the officer discovered his mistake, the prisoner was discharged; but it was held that the officer was liable. And where a warrant recited a complaint against John R. Miller, and commanded the officer to arrest "the said William Miller, it was held, in

¹ Parsons, Ch. J., in *Nichols v. Thomas*, 4 Mass. 232.

² *Clark v. Bragdon*, 37 N. Hamp. 562; *Grumon v. Raymond*, 1 Conn. 40; *Sandford v. Nichols*, 13 Mass. 289.

³ *Rex v. Newman*, 1 Ld. Raym. 562; *Griswold v. Sedgwick*, 6 Cowen, 456; s. c. 1 Wend. 126; *Scott v. Ely*, 4 Ib. 555.

⁴ *Hoye v. Bush*, 2 Scott N. R. 86; 1 M. & G. 775.

⁵ 8 East R. 328.

⁶ 6 Cow. 456.

an action for false imprisonment, that the officer could not lawfully arrest John R., although he was the person intended.¹ *

§ 332. When the imprisonment is sought to be justified under a warrant of commitment, the warrant must show the grounds upon which it was granted.† Where a mittimus

¹ *Miller v. Foley*, 28 Barb. 630; and see *Melvin v. Fisher*, 8 N. Hamp. 406; *Crawford v. Satchwell*, 2 Strange, 1218; *Cole v. Hindson*, 6 D. & E. 234; *Morgans v. Bridges*, 1 B. & A. 647.

* The facility with which criminals pass from one part of the country to another where they are wholly unknown, the various names they assume, and the difficulty of ascertaining their true names, especially in the case of foreigners, whose names are apt to be misunderstood and misspelled, and the importance of promptly arresting them, and to that end, of protecting officers in so doing, would seem to furnish some reasonable grounds for adjudging that, when the person who is really meant is arrested, though by a wrong name, such slight error, so harmless and so easily rectified, ought not to subject the officer to a suit. Should such an exception be sustained it could, probably, only be where the name was unknown or concealed, or falsely given, and the true party, against whom the process was issued, had been arrested (*McMahan v. Green*, 34 Vt. 69).

The misnomer of a town in which the jail is situate, in an execution, does not render the execution void, nor the imprisonment thereon, in the common jail of the county, a trespass (*Lewis v. Avery*, 8 Vt. 287).

A person arrested for a breach of the peace, cannot maintain an action for false imprisonment against the justice who issued the warrant, or the constable who served it, on account of a mere informality in the warrant, provided the justice have jurisdiction (*Cooper v. Adams*, 2 Blackf. 294).

Where a requisition, for a fugitive from justice is made by the governor of one State upon the governor of another State, and the latter causes the fugitive to be arrested and delivered to the person appointed for that purpose by the governor making the demand, an action for false imprisonment cannot be maintained against such person, on account of irregularity in the warrant of arrest (*Johnston v. Vanamringe*, 5 Blackf. 311).

† In *Hall v. Howd et al.* 10 Conn. 514, the defendant Howd, as captain of a company, issued two warrants, directed to a constable, commanding him, of the goods and chattels of the plaintiff to levy and collect two fines imposed upon the plaintiff for not performing military duty in the company; and for want of such goods and chattels to take the body of the plaintiff, and commit him to jail. In virtue of these warrants, the defendant Austin, as a constable, with the assistance of Bartholomew, the other defendant, arrested the plaintiff, and committed him to prison. For these acts of the defendants, the plaintiff brought this action; and the question in the case was, whether they could be justified; in other words, whether the warrants were such as the defendant Howd had a right to issue, and the other defendants to execute. It was not stated in the warrants that the fines which the constable was commanded to collect had been imposed by the officer who issued the warrants. It was stated that the fines had been legally imposed, but by whom did not appear either from the warrants themselves, or by reference to any record or proceedings whatever. It is true, they were signed by Howd as captain of the company. But the neglect charged upon the plaintiff took place, in one instance more than seven, and in the other more than eleven months, prior to the date of the warrants. Although Howd might have been the captain at the time of issuing the warrants, it did not necessarily follow that he was the commanding officer

did not show the cause of commitment, and an action of trespass therefor was brought against the justice, the constable who executed the mittimus, and the persons who assisted the constable, it was held that the mittimus was no justification.¹ It is however sufficient to state the cause in general terms. To a declaration for trespass and false imprisonment against the high bailiff of a county court, and the governor of the jail, the defendants justified under a warrant, under the seal of the county court, and directed to them, whereby after reciting that the plaintiff had wilfully insulted the judge, during his sitting, and that thereupon the judge had ordered the plaintiff to be taken into custody, and detained until the rising of the court, it "therefore" required the defendants to arrest the plaintiff, and imprison him for seven days. It was held, that the warrant was not bad for uncertainty, in specifying the cause of commitment, or for omitting to describe the nature of the insult, and that the recital, that the plaintiff had insulted the judge, was a sufficient adjudication of the offense.²

7. *Duty of officer to communicate substance of warrant.*

§ 333. We have already spoken of the duty of the officer to show his warrant of arrest when asked to do so.³ Although he is not bound to exhibit the warrant in the first instance—especially where there may be reason to apprehend that it may be lost or destroyed—yet it is his duty to inform the party, where such is the fact, that he has a warrant, or to make known in some other way, that he comes in his character as an officer to execute legal process; and not leave

six months or a year previous. But whether he was, or was not, the law in a case like this, would not intend that the fines were imposed by him in the absence of any averment of that kind. It was therefore held that the warrants were void and afforded no justification to the defendants.

Where an inferior court was held from three weeks to three weeks, and the writ was stated in a justification to have the body at the next court generally, it was held good, and that a certain day need not be shown (*Rowland v. Veale*, Cowp. 20).

¹ *Hawkins v. Johnson*, 3 Blackf. 46.

² *Levy v. Moylan*, 1 Pr. R. 307; 14 Jur. 983; 19 L. J. C. P. 308.

³ *Ante*, § 209.

the party to suppose that he is assailed by a wrong-doer. This however is where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. Cases will occur, in which the officer will be justified in laying hands on the party before a word is spoken. But either before, or at the moment of arrest, the officer ought to say enough to show the party that he is not dealing with a trespasser, but with a minister of justice.¹ *

8. *Liability of officer in execution of process.*

§ 334. Although where it appears on the face of the process that the court or magistrate that issued it had no jurisdiction of the subject-matter of the suit, or of the person of the party against whom it is directed, it is void not only as respects the court or magistrate, and the party at whose instance it is sued out, but affords no protection to the officer who has acted under it; yet when the court, issuing process, has general jurisdiction, and the process is regular on its face, the officer is not affected by an irregularity in the proceedings.² As a general rule, the officer is bound only to see that the process, which he is called upon to execute, is in due and regular form, and issued from a court having jurisdiction of the subject.³ † In *Nason agst. Sewall*,⁴ which was an ac-

¹ *Fost. Cr. L.* 310; 1 *Russ. on Cr.* 451, 514; *Countess of Rutland's Case*, 6 *Co.* 54; *Mackalley's Case*, 9 *Co.* 69; *Com. v. Field*, 13 *Mass.* 321; *Arnold v. Steeves*, 10 *Wend.* 514; *Bellows v. Shannon*, 2 *Hill*, 86.

² *Savacool v. Boughton*, 5 *Wend.* 170; *Gorton v. Frizzell*, 20 *Ill.* 291; *Wooster agst. Parsons*, *Kirby*, 110; *McMahan v. Green*, 34 *Vt.* 69.

³ *Fitzpatrick v. Kelly*, cited 3 *T. R.* 740; *Cameron v. Lightfoot*, 2 *W. Bl.* 1190; *Belk v. Broadbent*, 3 *T. R.* 185; *Tarleton v. Fisher*, 2 *Doug.* 671; *Smith v. Bowker*, 1 *Mass.* 76; *Haskell v. Sumner*, 1 *Pick.* 459; *Nichols v. Thomas*, 4 *Mass.* 232; *Sandford v. Nichols*, 13 *Ib.* 288; *Wilmarth v. Burt*, 7 *Metc.* 257; *post*, § 461.

⁴ *Brayt.* 119.

* "A regular officer is not bound to exhibit his authority or process when he arrests a defendant; a special deputy is. But if it were his duty to exhibit it when demanded, his refusal would not constitute him a trespasser, if he could show that he had a regular legal process in his possession, which authorized the arrest" (*Arnold v. Steeves*, 10 *Wend.* 514, per *Sutherland, J.*)

In Connecticut, grand jurors who are empowered by law to make arrests, are known officers, and as such are not bound to declare their character, nor the cause of arrest, until the party submit to the arrest, or at least demand the cause (*Ward v. Green*, 11 *Conn.* 455).

† In an action for false imprisonment for an arrest upon a writ of *capias* is-

tion for assault and battery, and false imprisonment, it was pleaded that an action having been brought against the plaintiff, in the Circuit Court of the United States, and judgment obtained against him therein, and execution issued, he was arrested and detained in custody by the United States marshal, which was the trespass alleged. The court said: "The authorities are full in point, that trespass will not lie in this case, and these pleadings present a strong case for their application. By maintaining this action, the court would, in effect, attempt to control the process of the Circuit Court of the United States. It would be very inconsistent that this court should support an action for false imprisonment, for confinement on an execution issuing from that court, while that court may refuse to relieve the prisoner by setting aside the execution, and may even sustain an action for an escape, should he be liberated by the jailer."

§ 335. A good deal of strictness has been required in justifying under process of courts of limited jurisdiction. Many cases may be found wherein it is stated generally, that when an inferior court exceeds its jurisdiction, its proceedings are entirely void, and afford no protection to the court, the party, or the officer who has executed its process. This proposition is undoubtedly true in its largest sense where the proceed-

sued on an informal affidavit, the defendant may justify under the writ, if it has not been set aside. Where in such case, the defendant justified under process of outlawry, and the plaintiff replied that there was no affidavit of debt made and filed, &c., and the defendant rejoined that there was such affidavit, and set out an irregular affidavit, and the plaintiff demurred; it was held, that the defendant was entitled to judgment, trespass not being maintainable where the process is irregular merely, and not void (*Riddel v. Pakeman*, 2 C. M. & R. 30; 1 Gale, 104; 5 Tyr. 721).

The statute of New Hampshire which provides that "no person to whom any list of taxes shall be committed for collection, shall be liable to any suit or action by reason of any irregularity or illegality of the proceedings of the town or of the selectmen," &c., is sufficiently broad to embrace the acts which precede the town meeting, as well as its acts when convened; and the acts of the selectmen who called the meeting, as well as of the board created by it. But when the clause is added, "nor for any cause whatever, except his own official misconduct," the statute seems to afford ample protection to all acts of the party acting under color of an appointment, except such as amount to official misconduct. The statute works no injury to those who may deem themselves aggrieved by the forcible collection of an illegal tax; but simply limits their choice of a remedy, and exempts innocent parties from the consequences of the official misconduct of others (*Woods, J., in Osgood v. Welch*, 19 N. Hamp. 105).

ings are, *coram non judice*, and the process by which the officer seeks to make out his justification shows that the court had not jurisdiction. But it is otherwise when the subject-matter of the suit is within the jurisdiction of the court, and the alleged defect of jurisdiction arises from some other cause. A distinction has long existed in cases of this kind, between the court which exceeds its jurisdiction, and the party at whose instance it takes place, and a mere ministerial officer who executes the process; the officer having a protection which the party has not, whether the court be one of general or limited jurisdiction.^{1*} The right of a ministerial officer to justify under his process where the court or a party cannot, was considered but not settled, in *Smith v. Bouchier*,² decided in 1734. Process was issued from the Chancellor's Court of Oxford against Smith, who was arrested and committed to jail. The proceedings were instituted without proving what was requisite to give the court jurisdiction. The plaintiff who procured the proceedings, the vice-chancellor who held the court, and the officers who executed the process, were all sued by the defendant Smith for false imprisonment. They united in their plea of justification, and

¹ *Savacool v. Boughton*, 5 Wend. 170.

² 2 Strange, 993.

* We have seen, *ante*, § 307, that where a person has been arrested and imprisoned by virtue of process which has been set aside as irregular, all concerned in the suing out of the process, are liable for an assault and false imprisonment; but the officer, who had no option but to obey the process, is protected by it (*Parsons v. Lloyd*, 2 W. Bl. 844). But it is different where the process is set aside not for irregularity, but for error. "In the one case, a man acts irregularly and improperly without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But where he relies upon the judgment of a competent court, he is protected" (*Williams v. Smith*, 14 C. B. N. S. 596; *Cooper v. Harding*, 7 Q. B. 928; *Philips v. Biron*, 1 Str. 509).

It has been held in Indiana, that in order to justify a constable in making an arrest under process issued by a justice, the writ need not have been founded on an affidavit. But it is otherwise as to a justification by a party or the justice (*Davis v. Bush*, 4 Blackf. 330).

It is not false imprisonment to bring up a prisoner on *habeas corpus* issued by a judge who has no jurisdiction of the case (*The State v. Guest*, 6 Ala. 778).

An arrest by an officer under an execution after the expiration of the time within which the execution was made returnable, will make the officer a trespasser (*Stoyel v. Lawrence*, 3 Day, 1; *Lofland v. Jefferson*, 4 Harring. 303).

Where an order of arrest commands an officer to arrest a person and take him forthwith before a justice, the officer will not be justified in taking his prisoner to jail (*Hynes v. Jungren*, 8 Kansas, 391).

were all pronounced guilty. According to *Strange*, the court remarked that the officer and jailer might have been excused if they had justified without the plaintiff and vice-chancellor. And it appears from the case, as reported in *Hardwicke's Cases*,¹ that the point of the officer's liability was not settled; for it is there said that there was no need of giving a distinct opinion as to the action lying against them. In *Hill v. Bate-man*,² the plaintiff had been fined under the game law, and was immediately sent to Bridewell without any attempt to levy the penalty upon his goods. This the justice had no right to do, and he was held liable for the imprisonment; but the constable was justified. It is to be understood from this case that the justice had not jurisdiction to issue process to commit the party until he had attempted to levy the fine upon his goods; but that after he had made that attempt without success, he had authority to commit him. The process, though unauthorized by the circumstances of the case, would, under other circumstances, have been proper. The issuing of the process was a matter within the justice's jurisdiction. This was sufficient for the officer's justification.*

¹ P. 69.² 1 *Strange*, 710.

* In New Hampshire, a collector of taxes is not obliged to make unsuccessful search for property in order to lay the foundation for an arrest of the delinquent tax payer. He is not bound to seek the party at his own home rather than elsewhere, to enforce his warrant, but may enforce it wherever he can do so without embarrassment or inconvenience. In *Osgood v. Welch*, 19 N. Hamp. 105, which was an action for assault and false imprisonment, the plaintiff proposed to prove that the defendant said he hoped he should find the plaintiff away from home, because he wanted to arrest him instead of taking his property; that when the plaintiff was arrested, the parties went toward the plaintiff's house; that the plaintiff then exhibited certain property of sufficient value to satisfy the tax, telling the defendant that the property belonged to the plaintiff, and was unencumbered, and asking the defendant to take it for the tax, and release the plaintiff from arrest, but that the defendant refused so to do. A verdict having been found for the defendant in the court below, the Supreme Court refused to disturb it. It seems to have been understood in New Hampshire that if goods are attached on the original writ, the creditor may at his pleasure, abandon the attachment and levy upon the body. How it might be in such case, if property were actually tendered, with indemnity as to the ownership, need not now be considered. Nothing short of this, can exonerate the debtor from arrest. The analogy from the case of a creditor or sheriff to that of the collector, is very strong. And we perceive no reason for a distinction between the two cases. But the officer having once made the arrest, has no power to distrain the property (*Rev. Sts. of N. Hamp. ch. 45, § 8; Kingsley v. Hall*, 9 N. Hamp. 190; *Butler v. Washburn*, 5 Post, 251). In Vermont, to entitle the debtor to redress where he is committed on execution when the execution should have been levied

In *Shergold v. Holloway*,¹ a justice issued a warrant on a complaint for not paying wages, and the defendant, a constable, arrested Shergold on it. He was sued for this arrest. The court said the justice had no authority in any instance to proceed by warrant, a summons being the only process. Accordingly, the constable could not justify, as he was presumed to know that under no circumstances could a warrant be issued in such a case. Therefore the court said that there was no pretence for such a jurisdiction. This decision would doubtless have been different if it had appeared that under any state of things, a proceeding by warrant was allowable in such a case; for then the court would assume for the officer's protection, that such a state of things did exist, or at least, he should not be required to judge whether it did or not. *Warner v. Shed*² was an action of trespass and false imprisonment against a constable for arresting and imprisoning the plaintiff by virtue of a warrant of commitment issued under the hands and seals of three justices of the peace. The warrant stated that the plaintiff and another had been convicted at a court of special sessions for an assault and battery, and it mentioned the three justices before whom the plaintiff had been brought. These justices had jurisdiction in certain cases of breaches of the peace, and had power to fine and imprison for the same. They had jurisdiction, therefore, of the subject-matter; and it was held that that was sufficient to justify the constable in serving the *mittimus*, and that he was not bound to examine into the validity of the proceedings and of the process.*

on his property, it must appear that the debtor was ready to acquiesce in the taking of his property (*Warner v. Stockwell*, 9 Vt. 9). In the case of taking the body for taxes, in order to make the tax collector liable, there must have been a tender of property (*Flint v. Whitney*, 28 Vt. 680). An arrest upon a warrant for the collection of taxes is in the nature of an arrest at common law upon final process (*Butler v. Washburn*, 5 Fost. 251).

¹ *Ibid.* 1002.

² 10 Johns. 138.

* In Massachusetts, under the statute of 1850, ch. 314, the jurisdiction of justices of the peace in the examination and trial of persons charged with criminal offenses, was taken away, and the same was transferred to certain new officers, called trial justices, leaving to justices of the peace only the authority to receive complaints and issue warrants for the apprehension of alleged criminal

§ 336. An officer who has an execution in common form, authorizing and requiring him to take the property of the debtor to satisfy the execution, and for want thereof to arrest the debtor, will be protected in arresting and committing the debtor, although before he is arrested he shows to the officer his discharge under the insolvent law. It is easy to see that it would paralyze the action of an officer, and often defeat the service of legal process, if he were bound to stop and try the genuineness and validity of a certificate of discharge under a bankrupt or insolvent law. The certificate may not be genuine or legally authenticated, and yet the officer can take no evidence, nor even put the debtor himself under oath to prove it. *Wilmarth v. Burt*,¹ was an action of trespass against a deputy sheriff, for arresting the plaintiff on an execution. The plaintiff sought to avoid the officer's justification, by proving that he had obtained a certificate of discharge under the insolvent law of Massachusetts, which discharge was obtained long after the date of the contract on which the judgment was recovered, and that he exhibited his discharge to the defendant at the time of the arrest. It did not distinctly appear whether the judgment on which the execution issued, was rendered before or after the plaintiff's discharge, but there was ground to presume that it was rendered some time after. The court said it was very clear that the officer could take no notice of such a discharge, for two reasons: 1st. If the debtor had his discharge before the

offenders, returnable before any of the trial justices of the same county. After the passage of this act, therefore, the issuing of a warrant by a justice of the peace, directing an arrest of an individual upon a criminal charge, and that the party be taken before a justice of the peace, for examination or trial, would be an act unauthorized by law; and the process would, upon the face of it, show such want of jurisdiction as to the process, that if in execution thereof, the party was actually arrested and held for trial before a justice of the peace, the officer thus arresting the party and holding him for trial, as well as the magistrate who issued such warrant, would be liable therefor in an action of trespass. In *Stetson v. Packer*, 7 Cush. 562, which was an action of trespass for illegal arrest, it appeared that the warrant commanded the officer to take the prisoner "before A., or some other justice of the peace within and for the county," and that A. was both a trial justice and a justice of the peace. It was held that the officer had no right to take the prisoner before any other trial justice, and if he did so, the officer and all aiding him would be liable as trespassers.

¹ 7 Metc. 257; and see *Ewart v. Jones*, 14 Mees. & W. 774; *post*, § 468.

rendition of the judgment, he had an opportunity to plead it by way of defense, and if he did not do so, it was to be presumed that it was not valid. 2d. If the judgment was rendered after the discharge, it might have been founded on a cause of action which accrued after the discharge, and the officer could not by possibility know that it was not so. If the plaintiff in such case has any remedy, it is not against the officer who has simply executed the regular precept of a court having jurisdiction, but by applying for his discharge out of custody, or by *audita querela*, or by an action on the case against the party who thus wrongfully armed the officer with power to arrest him, upon the ground of its being on his part a malicious arrest.

§ 337. The arrest of a privileged person upon regular process, does not form an exception to the general rule that a ministerial officer is protected in the execution of process, whenever there is jurisdiction of the subject-matter, unless he act maliciously, if the process be regular on its face, and does not disclose the want of jurisdiction.¹ The decisions on the question of privilege all seem to be based on the principle that where the process is regular and effective, the sheriff is not bound to take notice of a claim of privilege from arrest, which is personal to the party, inasmuch as he is not vested with authority to judge and determine the validity of the claim, which may properly be contested. The process justifies the officer in making the arrest, so far as being a trespasser is concerned, and the party claiming the exemption must avail himself of it before a tribunal competent to determine its validity. This may be done by a motion to the court to quash or to discharge, in the case of returnable process; and where the process is not returnable, by an application for relief to some tribunal having jurisdiction to afford it.² This question of privilege is of course not

¹ State v. Hamilton, 9 Mo. 784.

² Wood v. Kinsman, 5 Vt. 588; Brown v. Getchell, 11 Mass. 11; Cable v. Cooper, 15 Johns. 152; Carle v. Delesdernier, 13 Maine, 363; Plummer v. Dennett, 6 Greenlf. 421; Com. v. Kennard, 8 Pick. 133.

applicable when the exemption is not personal, but general, including all persons whatever.¹ *

§ 338. An exemption from arrest, whether existing at common law or by statute, is a personal privilege, and may be waived by the party entitled to it; which he will be deemed to have done unless he avail himself of the first opportunity to assert it and obtain his liberty.² *Woods v. Davis*³ was an action of trespass against a collector of taxes for arresting the plaintiff and detaining him an hour and a half, until the tax was paid by the friends of the plaintiff, the arrest having been made at the annual town meeting at which the plaintiff was entitled to vote. At the time of the arrest nothing was said by him about his voting, or his right to vote, nor did he claim exemption from arrest on the ground of his privilege as a voter; but it appeared that the defendant, at the plaintiff's request, sent for a friend of the plaintiff, who, after consultation with the plaintiff, paid the tax at the latter's request. It was held that as a waiver and voluntary submission on the part of the plaintiff was fairly to be presumed, the action could not be maintained.

§ 339. If the wrong person be arrested, the officer will be liable, unless the person arrested was himself the cause of the arrest, by giving false information.⁴ B. having been arrested under a writ against A., stated that she was the person named in the writ. It was held that, although B. might not be entitled to maintain an action against the officer for the arrest, yet that the latter could not justify detaining B. after he had notice that she was not the real party.⁵

¹ *Green v. Morse*, 5 Maine, 250; *Parsons v. Loyd*, 3 Wils. 341.

² *Dow v. Smith*, 7 Vt. 465; *Fletcher v. Baxter*, 2 Aiken, 224.

³ 34 N. Hamp. 328. ⁴ *Davies v. Jenkins*, 11 M. & W. 755; see *post*, § 352.

⁵ *Dunston v. Peterson*, 2 C. B. N. S. 495; 26 L. J. C. P. 267.

* Where the captain of a military company imposed a fine upon a minor who was a soldier therein, and issued a warrant for the collection of the fine, by virtue of which the minor was imprisoned, and the statute conferred upon the captain no power to issue warrants for the collection of fines, excepting against persons of full age; in an action of trespass brought by the minor against the captain, it was held that he was entitled to recover (*Mallory v. Bryant*, 17 Conn. 178; but see *Merriman v. Bryant*, 14 Ib. 200).

§ 340. Where the plaintiff's attorney gives the officer notice not to execute a *ca. sa.*, if the arrest be made after the receipt of the notice, it will constitute a false imprisonment; and notice from the attorney that the action is settled, or that the execution is withdrawn, is a notice not to make the arrest.¹

9. *Private person aiding officer in arrest.*

§ 341. Sheriffs and other officers are empowered by law to require suitable aid in the execution of their office in apprehending criminals. When a person is called upon by the sheriff to assist him in arresting another, he is not at liberty to refuse. Nor can he demand of the sheriff an inspection of the warrant under which he is acting, in order to see by what authority he is proceeding, and whether, in his judgment, it will be safe to assist him. It is sufficient that he is the sheriff (or deputy sheriff), a known public officer. The person thus called on is protected by the call from being sued for rendering the requisite assistance.²

§ 342. A sheriff may be guilty of a trespass, while those who are acting by his command are held excused. If the act itself be, in the first instance, lawful, but becomes a trespass *ab initio* by some subsequent misconduct of the sheriff, as for not returning the writ, it would be obviously unjust to hold the assistants liable for such constructive trespass. And there are probably other cases where the command of the sheriff would be a defense to those aiding him, though the sheriff himself might not be justified. Statutes empowering the sheriff to require suitable aid for the suppression of riots, and for the arrest of persons violating the peace, are only in affirmance of the common law, by which the sheriff might raise the *posse comitatus*, or, in other words, such a number of the men of the county as were necessary for his assistance in the execution of the king's writs, quelling riots,

¹ Dutcher v. Hinder, 28 L. J. Exch. 28; Withers v. Parker, 4 H. & N. 524.

² Bac. Abr. Tit. Sheriff, n. 2; Main v. McCarty, 15 Ill. 441.

apprehending traitors, robbers, &c.¹ In *McMahon v. Green*,² it appeared that the plaintiff was arrested by a deputy sheriff upon a warrant issued against John McManus for an assault with intent to commit rape; that the defendant was required by the officer to assist him in making the arrest, and that in obedience to such command he accompanied the officer in making the arrest, and in committing the plaintiff to prison. The plaintiff's name was John McMahon, instead of John McManus, and upon this ground he claimed that the warrant was void against him, and that the defendant was liable. Judgment, however, having been rendered for the defendant, it was affirmed by the Supreme Court.

§ 343. But where the original act of the officer in the service of civil process is manifestly illegal, those aiding him will be trespassers, though they act by his command. In *Hooker v. Smith*,³ the defendants, in their plea in bar, described the process, and stated that the sheriff requested them to assist him in executing it; and in the replication, the truth of which was admitted by a demurrer, it was alleged that the defendants entered the plaintiff's dwelling by forcibly breaking the outer door for the purpose, and with the intent, to execute therein the writ of execution by arresting his body. The court remarked that, as the defendants, with the full knowledge that the sheriff was about to do an illegal act, united with him in committing it, they must share with him in the consequences; and that a contrary doctrine would enable a sheriff, under color of civil process, to add to his own physical power to accomplish an illegal object the power of a lawless, but wholly irresponsible mob.

§ 344. All who aid and assist in the unlawful confinement of another are liable for the false imprisonment, although they had no hand in the original arrest, and did not know that it and the imprisonment were illegal.⁴ It has

¹ Hammond's N. P. 63, 65.

² 34 Vt. 69.

³ 19 Vt. 151.

⁴ *Griffin v. Coleman*, 28 L. J. Exch. 137; 4 H. & N. 265.

been held, that if, while A. is unlawfully imprisoned by B., C. commits an assault upon him, C. is guilty of the false imprisonment as well as B., and that if A. sue both separately, the pendency of one suit may be pleaded in abatement to the other.¹

10. *What constitutes an arrest.*

§ 345. An arrest is usually made by taking the person into actual custody. The common practice is to put the hand upon the individual, and any touching, however slight, is sufficient. In an anonymous case,² Chief Justice Holt said: "If a window be open, and a bailiff put in his hand and touch one against whom he has a warrant, he is thereby his prisoner." In another anonymous case,³ it is said: "A bailiff having a warrant, perceiving a debtor's hand out of the window, seized it, and the court held it a sufficient arrest."

§ 346. But no manual touching of the body or actual force is necessary to constitute an arrest, if the party be within the power of the officer, and submits to the arrest.⁴ In *Williams v. Jones*,⁵ Lord Hardwicke said: "It does not follow that an arrest cannot be made without touching the person; for if one goes into a room and tells the occupant that he arrests him, and locks the door, there is an arrest." And in *Horner v. Battyn*,⁶ the arrest was held good, although mere words were used, because the debtor submitted to the arrest. So, where the defendant, for purposes of extortion, had placed a writ in the hands of a sheriff's officer, with instructions to arrest the plaintiff unless he would give up some property, and the officer, finding his way to the plaintiff's sick bed, produced the writ and demanded the property, telling the plaintiff that unless it was delivered up to him a man would be left with him, and the plaintiff

¹ *Boyce v. Bayliffe*, 1 Camp. 60. See *Day v. Porter*, 2 M. & Rob. 151.

² 7 Mod. 8; K. B. 1701.

³ K. B. 1675, reported in 1 Vent. 306.

⁴ *Butler v. Washburn*, 5 Fost. 251; *Jenner v. Sparks*, 1 Salk. 79; s. c. 6 Mod. 173; *Gold v. Bissel*, 1 Wend. 210; *Pike v. Hanson*, 9 N. Hamp. R. 491.

⁵ 2 Strange, 1049.

⁶ Buller's N. P. 62.

yielded to the pressure and gave up the property, it was held that these facts amounted, in judgment of law, to an arrest.¹*

§ 347. It will have been observed from what we have already said on this subject, that there need not be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant—has the party in his presence and power, and the party so understands it, and in consequence thereof submits, and allows the officer to direct his movements without resistance, or the officer receives money or property in discharge of his person—it is in law an arrest. Accordingly, where in an action of trespass for assault and false imprisonment, it appeared that the plaintiff did not intend to pay her tax unless compelled by an arrest; that the collector was so informed; that he then proceeded to enforce the collection of the tax—declared that he arrested her—and she, under that restraint, paid the money; it was held that this was a sufficient arrest and imprisonment to sustain the action.² Where, however, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily, and without compulsion, attended the constable who had the warrant to the magistrate, it was held that there was no sufficient imprisonment to support the action.³ But in this case there was no declaration of any arrest, and the warrant was in fact used only as a summons. Unless the decision

¹ Granger v. Hill, 5 Scott, 561.

² Pike v. Hanson, *supra*; and see Wood v. Lane, 5 C. & P. 774.

³ Arrowsmith v. Le Mesurier, 2 N. R. 211.

* In an action for false imprisonment, it was proved that the plaintiff and one of his sons were passing the house of a constable in a wagon, when the latter came out and said, "I have a warrant for you and your two sons." The plaintiff asked him for what? He said, "For stealing pumpkins." The plaintiff got partly out of the wagon, when the constable said, "You can go home, put up your horses, take your tea, and come down." The plaintiff did so, employed a lawyer, and with him and his two sons went to the constable's house, called him out, and said, "Here are your prisoners." The constable said, "You move on, and I will overtake you." They went forward, and the constable, overtaking them at the house of the justice, they entered together. After some discussion before the justice, the matter was adjourned without requiring bail. On the adjourned day the plaintiff appeared, an examination was had, and the case discharged. It was held that there had been a sufficient arrest to sustain the action (Searls v. Viets, 2 Thompson & Cook, N. Y. Supm. Ct. 224).

can be sustained upon this distinction, it must be regarded as of doubtful authority.

§ 348. If bare words be relied upon to make an arrest, there must exist the power to take immediate possession of the body, and the party's submission thereto. *Genner*, a bailiff, had a warrant against *Sparks*, and went to him in his yard, told him he had a warrant for him, and said, "I arrest you." *Sparks* had a fork in his hand and kept the bailiff from touching him. Neither the bare power to arrest, nor the words "I arrest you," constituted an arrest. But the court said if the bailiff had touched him, that would have been an arrest.¹ Where, however, a person being notified by an officer that he came to arrest him under a warrant, submitted, the officer went home with him, stayed there all night, and the next day took him before a magistrate, it was held that this constituted an arrest, although the party was not actually deprived of his liberty, nor personally guarded by the officer.² So, where a bailiff having a writ against a person, met him on horseback and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never touched him. But if, upon the bailiff saying these words, the party had fled, it would not have been an arrest, unless the bailiff had laid hold of him.³*

11. *Detention by officer of party arrested.*

§ 349. An officer is not bound, in order to retain his arrest, to keep his hands upon his prisoner, or to secure him. He may allow reasonable liberties to a debtor in custody; and as between him and the debtor, the latter cannot com-

¹ *Genner v. Sparks*, 1 Salk. 79; 2 Esp. N. P. 374.

² *Courtoy v. Dozier*, 20 Geo. 369.

³ *Homer v. Battyn*, Buller's N. P. 62; *Russen v. Lucas*, 1 C. & P. 153; *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, Ry. & M. 321; *Strout v. Gooch*, 8 Greenl. 127; *Gold v. Bissel*, 1 Wend. 210.

* To constitute an arrest of the person, the officer must have the custody and control of the defendant's body, at least potentially, and he must claim that control, and unless it is submitted to, must put it in actual exercise.

plain of liberties which he requested, or to which he assented, provided there was no abandonment of the arrest.¹ Where, at the time a debtor was arrested upon a writ procured by affidavit, the magistrate signing the writ was temporarily absent from the county, and the debtor notified the officer that he wished to be taken before the magistrate for examination, it was held that, although the officer had no right to commit him forthwith to jail, yet that he might detain the debtor a reasonable time to await an examination, and need not make himself the personal keeper of the debtor during the period of such delay, but might use the common jail for that purpose.² *

§ 350. When the arrest is made at a distance from home, the officer has a right to start with his prisoner at any hour he may choose, or his business may require, and in such weather as he may find at the time; provided he does not needlessly expose the prisoner's health, or do him a personal injury. It will not answer unnecessarily to restrict an officer in these particulars, and therefore no certain rules can be laid down.³

§ 351. Where a person is convicted and sentenced to imprisonment by a court having no jurisdiction, an action will lie against those who keep the accused in confinement.⁴ The plaintiff, being a debtor to a bankrupt's estate, was summoned to appear and be examined before the district court of bankruptcy in which the *fiat* was prosecuted; but refusing to come, was arrested by the defendant, the messenger of the court, under a warrant of the commissioner, and brought up in custody to be examined. At the conclusion of his ex-

¹ Butler v. Washburn, 5 Fost. 251.

² Whitcomb v. Cook, 38 Vt. 477.

³ Butler v. Washburn, *supra*.

⁴ Patterson v. Prior, 18 Ind. 440.

* In New Jersey, in an action for assault and false imprisonment, it appeared that a criminal warrant having been issued by a justice in one county, and indorsed by a justice of another county wherein the arrest was made, the officer refused to take his prisoner before the indorsing justice, but took him without actual force into the first county before the justice who issued the warrant; and it was held that the officer was liable (Francisco v. State, 4 Zab. N. J. 30; Rev. Sts. of N. J. 227, § 12).

amination, to which the plaintiff voluntarily submitted, the commissioner said that he was discharged on payment of the costs incurred in bringing him up; and a memorandum to that effect was indorsed on the warrant. The defendant in consequence detained the plaintiff until the costs incurred in bringing him up were taxed and paid by him under protest. It was held, first, that the foregoing memorandum amounted to an order to detain the plaintiff until the costs were paid; secondly, that the commissioner had no jurisdiction under the bankrupt acts to make such an order, and would have been liable to the plaintiff in an action of trespass for the imprisonment under it, and that consequently the defendant, who must be assumed to have known of such want of jurisdiction, was also liable. It was further held that if the commissioner had had jurisdiction to commit the plaintiff, the defendant would have been protected, though he had no warrant under the hand and seal of the commissioner.¹

§ 352. In England, it has been held that if the wrong man is arrested and handed over to a jailer, the jailer is liable for the wrongful imprisonment, notwithstanding he had no means of ascertaining the identity of the party brought to him with the person named in the warrant, and could not, consistently with his duty, have refused to receive and detain him; though if the party thus wrongfully detained did not apprize the jailer of the fact, only nominal damages could be recovered.² But the jailer will be protected in the regular and proper discharge of his duty, although the original arrest was wrongful. In *Oliet v. Bessey*,³ the plaintiff had been arrested by process without the jurisdiction of the court. He was carried within the liberty and delivered to the defendant, who was the jailer of the liberty; and the question was, whether false imprisonment lay. The court,

¹ *Watson v. Bodell*, 14 Mees. & W. 57; 14 L. J. N. S. 281; 9 Jur. 626.

² *Aaron v. Alexander*, 3 Camp. 35; *Griffin v. Coleman*, 4 H. & N. 265; 28 L. J. Exch. 134; *ante*, § 339.

³ *T. Jones*, 214.

after hearing much argument, held that the action did not lie against the jailer; for he had done no wrong to the party, but that only which belonged to his office, which did not oblige him to inquire whether the first arrest was tortious or not; and that even if he had been informed of the tortious taking he ought to have detained the prisoner, being delivered to him with a good warrant for the arrest. And in *Smith v. Shaw*,¹ which was an action against the officer commanding the provost guard at Sackett's Harbor during the last war between the United States and Great Britain, for unlawfully detaining the plaintiff in custody, the Supreme Court, in affirming the judgment of the court below, which was for the plaintiff, intimated that if the suit had been against the provost marshal, he would not have been liable for detaining the plaintiff; the situation of a provost marshal in such a case being somewhat analogous to that of the pound keeper in *Badkin v. Powell*,² where it was held that he was not a trespasser merely for receiving a distress, though the original taking was tortious, because he was bound to take and keep whatever was brought to him.*

12. *Officer's return.*

§ 353. Public ministerial officers are required to set forth the acts done by them, in order that the court may judge of their sufficiency.³ An arrest upon process, of which return is to be made, cannot in general be justified without such return.⁴ † The return is not necessarily to be construed

¹ 12 Johns. 257.

² Cowp. 476.

³ *Henry v. Tilson*, 19 Vt. 447; *post*, §§ 373, 491.

⁴ *Poor v. Taggart*, 37 N. Hamp. 544; *Middleton v. Price*, 1 Wils. 17; s. c. 2 Strange, 1184; *Shorland v. Govett*, 5 B. & C. 485; *Tubbs v. Tukey*, 3 Cush. 438.

* The unlawful detention of a prisoner after he is entitled to his discharge is a fresh imprisonment (*Withers v. Henley*, Cro. Jac. 379).

The removal of a person from one part of a prison to another in which he is not legally confined, is a trespass (*Cobbett v. Grey*, 4 Exch. 729; 19 L. J. Exch. 137). But it seems that the Secretary of State is not liable in trespass if a person be so removed under a general order made by him for the classification of the prisoners which he had no legal authority to make (*Ib.*).

† In an action of trespass alleging an unlawful arrest, it was proved that the arrest was made on the 13th, under a legal warrant, which was duly returned on

as setting out that the arrest was made on that day; but merely that the party had been arrested, and that the officer then had him in custody and produced him to the magistrate for examination. On what particular day the arrest was made, or what particular proceedings were had for the safe keeping of the party, or for insuring his presence before the magistrate at the time of the return of the warrant, whether that time be selected by the officer at his pleasure, or by agreement between him and the party, are immaterial matters not necessary to be stated in the return.¹

§ 354. Where the arrest of a party can be justified only upon its being made to appear, on the return of the officer, that he can find no goods whereon to levy, and this is not stated by him in express terms, but, taking into consideration the whole of the return, that conclusion appears to be a direct and unavoidable inference from its statements, it will be sufficient. In the case where this question arose, it was not suggested by the plaintiff that in fact any goods existed, which could, upon search or inquiry, have been found whereon the officer might have levied. The plaintiff only relied upon a supposed imperfection, not in the discharge by the officer of his duty, but in the account which he rendered of its performance.²

§ 355. Where a statute requires an officer, in committing a person to jail, to certify, upon the copy of his warrant left with the jailer, "his doings in relation to the delinquent," his certificate must contain all the facts which justify him in making the arrest and imprisonment; and he will not be permitted, in an action against him for false imprison-

the 22d, with a proper return of the arrest thereon. It did not appear that there was any other arrest, or that there were any proceedings of an unlawful character connected with or subsequent to it, to render the defendants liable as trespassers by reason of them. It was held that an arrangement entered into between the officer and the person arrested, for his appearance at a future day, agreed upon between them as the day of hearing, was legal and proper (*Poor v. Taggart*, 37 N. Hamp. 544).

¹ *Poor v. Taggart*, *supra*.

² *Snow v. Clark*, 9 Gray, 190.

ment, to supply these facts by parol.¹ A general allegation that he "has proceeded according to law," is insufficient where any statement of his proceedings is necessary.² So likewise, a general statement is not sufficient to show that he has given the party the notice required by law.^{3*}

§ 356. The official return of a public officer is *prima facie* evidence in the officer's favor in the prosecution or defense of a collateral action. It is admissible on the ground of the general credit due to the return of an officer when it is his duty to make a return. But it is subject to contradiction by third persons, because they are neither parties nor privies to the transaction, and because they have no remedy against the officer for a false return. It is also open to contradiction collaterally, as against the officer, even by a party to the process, to avoid circuitry of action.⁴ In *Barrett v. Copeland*,⁵ which was an action for assault and battery and false imprisonment, the defendant pleaded the general issue, and also a plea in justification that he made the arrest as constable, on an execution against the plaintiff; and he gave in evidence the execution and his return thereon. The plaintiff, in order to impeach the return, offered to prove that he was away from home, and not where he could have been arrested on the execution referred to, at the time the return purported to show that the defendant had first arrested the plaintiff. This evidence having been excluded at the trial in the

¹ *Henry v. Tilson*, 19 Vt. 447.

² *Briggs v. Whipple*, 7 Vt. 15.

³ *Henry v. Tilson*, *supra*.

⁴ *Gyford v. Woodgate*, 11 East, 296; *Hathaway v. Goodrich*, 5 Vt. 65; *Stanton v. Hodges*, 6 Vt. 66.

⁵ 18 Vt. 67.

* Where collectors of taxes, in committing a person to jail, neglected to make upon the copy of the warrant left with the jailer a scrawl or letters "L. S.," indicating the place of the seal upon the warrant, it was held that such omission did not make them liable as trespassers (*Gordon v. Clifford et al.* 8 Fost. 402). Eastman, J : "This error is, at best, a mere nonfeasance in copying the warrant; a clerical mistake in not putting upon the copy some hieroglyphics indicating that there was a seal upon the warrant, and its place. All the language of the warrant is correctly copied, and the indorsements required by statute properly made, and we do not think that this error in making the copy can or should render the officers trespassers *ab initio*."

county court, and judgment rendered for the defendant, it was reversed by the Supreme Court.

13. *Responsibility of magistrates.*

§ 357. The official oath required by law is requisite to legal induction into office; and the incumbent who has been duly elected or appointed to such office, and assumes its duties without taking the oath, is not an officer *de jure*, and cannot, therefore, in an action against him for false imprisonment, justify under his official character. Third persons are not supposed to have the means of knowing whether the officer has properly qualified. As to them, he is an officer *de facto*, and his acts cannot be brought in question. But the officer has no such immunity; as he must always know whether or not he has complied with the requirements of the law.¹

§ 358. In an action of trespass against a magistrate for arrest and imprisonment under a supposed judicial decision, there is but a single question, to wit:—whether the defendant had jurisdiction to render the judgment under which the plaintiff was arrested. If he had such jurisdiction, he cannot be charged in the suit. The court will not inquire whether or not the power has been wisely exercised, or whether the decision is right or wrong, in form or substance.² In *Yates v. Lansing*,³ the liability of judges to answer to individuals affected by their decisions, for damages, was considered; and it was there shown that from the earliest ages of the common law it has always been held that no judge is answerable in a civil action, on account of any judgment rendered by him as a judge. To this rule there is but one exception. If the judge has assumed to act as such, in a case where he has no jurisdiction, his character of judge furnishes him no protection. The jurisdiction of courts and judges

¹ *Courser v. Powers*, 34 Vt. 517; *Newman v. Tiernan*, 37 Barb. 159.

² *Burnham v. Stevens*, 33 N. Hamp. 247.

³ 5 Johns. 282; affirmed, 9 Ib. 395.

and others exercising judicial powers, may be very general, or very limited; limited as to place, as to persons, as to subject-matter, and as to the course of proceedings; and a failure of jurisdiction, in any of these respects, is fatal to any defense which rests on the assumption that the party attempted to be charged was acting in a judicial capacity.*

§ 359. We have spoken, in a previous chapter,¹ of the well established principle, that when a magistrate or other officer, having a special and limited jurisdiction, issues a warrant to take the person or property of another, he must show upon the face of his proceedings that he has jurisdiction; that nothing will be intended in his favor; and that it must appear that he has jurisdiction over the subject-matter, the person and the process.² An action having been brought to recover a fine imposed by a court martial, it was held that a court martial, being a court of limited and special jurisdiction, the law would intend nothing in its favor; that he who sought to enforce its sentences or justify its judgments must set forth affirmatively and clearly all the facts necessary to show that it was legally constituted and had jurisdiction.³ Where a special act provided that "all warrants alleging any offense to have been committed within said city (Augusta),

¹ *Ante*, § 54.

² See *Hall v. Howd*, 10 Conn. 514.

³ *Brooks v. Adams*, 11 Pick. 441.

* In *Mather v. Hood*, 8 Johns. 45, it was held that a record of conviction of a justice, under the act of New York to prevent forcible entries and detainers, was not traversable; and that if it appeared that the justice had jurisdiction and proceeded regularly, it was conclusive, and a bar to a suit against him for anything adjudged and within his jurisdiction. But it was not held in that case, nor is there any case that sanctions the doctrine, that by force of a conviction before a magistrate the party affected by it may not show, even in a collateral action, where the conviction is set up as a defense, or comes in question, that the magistrate did not have jurisdiction of the person against whom the conviction operates (see opinion of Spencer, Ch. J., in *Bigelow v. Stearns*, 19 Johns. 39).

In New York, it was held, in an early case, that in an action against a justice of the peace, for assault and battery and false imprisonment, the defendant might justify by virtue of a judgment and execution, without showing that he acquired jurisdiction of the person of the party, or alleging that the party appeared before him, or that he was a resident of the county at the time the summons was issued (*Hoose v. Sherrill*, 16 Wend 33, *Bronson, J.*, dissenting).

Where a magistrate does not have jurisdiction, all who advise or act with him, or execute his process, are trespassers (*Von Ketler v. Johnson*, 57 Ill. 109).

shall be made returnable before said court " (municipal court), and the warrant was not made returnable before that court, although the offense was therein alleged to have been committed within Augusta, it was held that it conferred no authority on the magistrate to hear and determine the subject-matter of the complaint, or on the officer to arrest and return the alleged offender before such magistrate, and that for their acts in this particular they were trespassers.¹

§ 360. Judicial acts exercised by persons whose judicial authority is limited as to locality, must appear to have been done within the locality to which the authority is limited. In *King v. Chilverscoton*,² where two justices made an order for the removal of a pauper and his family, and having mentioned in their order two counties, Warwick and Coventry, afterward described themselves as justices of the peace for the county aforesaid, without designating which of the counties, although it was admitted that if they had been justices of the county of Warwick, and had so described themselves, their order would have been good, yet, as it did not appear upon the face of the order that the justices who made it had jurisdiction, it was holden void.*

§ 361. A magistrate cannot (excepting, perhaps, in the case of a mere vagrant) lawfully detain a known person to answer a charge not yet made against him. The justice should have an information regularly before him, that he may be able to judge whether it charges any offense which the person ought to answer.³ Accordingly, when a person

¹ *Wills v. Whittier*, 45 Maine, 544.

² 8 Term. R. 178.

³ *Rex v. Birnie*, 1 Mood. & R. 160; 5 C. & P. 206.

* A similar decision was afterward made in the case of *The King v. The Inhabitants of Moor Critchell*, 2 East, 66. So in *Starr v. Scott*, 8 Conn. 480, it was held that a certificate of the commissioners upon an insolvent debtor's estate, which did not contain an averment that they had given the notice, which, by statute, they were required to give, was void, and afforded no protection to the debtor or the sheriff, who, in that case, had suffered the debtor to depart from prison.

In England, it has been held not sufficient to describe a magistrate as justice *in* the county, nor as justice *for* the county. He must be described as doing the act as "justice in and for the county" (*Reg. v. Totness*, 11 Q. B. 90; *Reg. v. Crowan*, 14 Ib. 221; *Reg. v. Stockton*, 7 Q. B. 520).

has been arrested and is being taken before a magistrate for examination, it is not competent for the magistrate who meets them in the street to direct the officer to take the man back to jail. It is a magistrate's duty, on all occasions, either to examine into a charge, or, if there is a reason why he cannot examine into it, to direct the constable to take the party before some other magistrate.¹ Where a magistrate issued a warrant for the arrest of a person charged with riot, late Saturday night, and indorsed thereon that the accused be committed until the next Monday for examination, which was done, it was held that both the magistrate and officer were liable as trespassers.² And it has been held that, if a magistrate issues a warrant of arrest in a criminal case, upon a statement of facts on information and belief, when he has certain information that full knowledge is within his reach, he and the complainant are jointly liable in an action for false imprisonment.^{3*}

§ 362. If a court of limited jurisdiction issues process which is illegal, and not merely erroneous; or if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained jurisdiction of the person by having him before it in the manner required

¹ Edwards v. Ferris, 7 C. & P. 542.

² Pratt v. Hill, 16 Barb. 303.

³ Comfort v. Fulton, 39 Barb. 56.

* In England, it has been held that the judge of an inferior court of record, who has made an order *simpliciter* for the payment of a debt by instalments, cannot, upon non-payment, issue his warrant for the imprisonment of the debtor, without giving him an opportunity of being heard as to the cause of such non-payment. Where, therefore, in trespass by A. against B. for false imprisonment, B. pleaded that J. S. recovered a judgment against A. in the Sheriff's Court, London; that A. was summoned and appeared before the judge of that court, who ordered the sum recovered to be paid by instalments; that the first instalment was demanded and not paid; that the judge duly, by warrant under his hand and seal, according to 8 & 9 Vict. ch. 127, ordered the officer of the court to take A. and convey him to prison for forty days; and that B., as the attorney of J. S., delivered the warrant to the officer, who took A. Replication that by this order it was not directed that A. should be committed *modo et forma*. It was held that the warrant issued did not support the plea, which must be taken to aver the existence of a legal warrant; and that the defendant, having acknowledged actual participation in the act of trespass by pleading in confession and avoidance, could not protect himself upon this issue by showing that he had acted merely as the attorney of J. S. (Kinning v. Buchanan, 8 C. B. 271; 7 D. & L. 169).

by law, the proceedings are void; and in the case of a limited and special jurisdiction the magistrate attempting to enforce a proceeding founded on any judgment, sentence, or conviction, in such a case becomes a trespasser.¹ Where a justice of the peace rendered judgment in an action on a note, after the expiration of the time when by law he was authorized to render such judgment, without giving the defendant any notice, and caused the defendant to be arrested and committed to jail, it was held, in an action for false imprisonment brought by him against the justice, that the latter was liable. After the suit had become discontinued by the omission of the justice to attend to it within the time allowed him by law, his power over the suit was at an end; and any proceedings by him afterward were *coram non judice*. He stood in the same situation as regarded the plaintiff as if no such suit had ever been commenced. When a person is required to answer before a justice, he ought to know at what time he must attend, and how long he must remain in order to discharge the duty imposed upon him by law. To suffer a magistrate to render judgment at any time afterward, at his pleasure, would open the door to a most mischievous abuse of judicial power.^{2*}

§ 363. Magistrates may render themselves liable as trespassers in consequence of wrong ministerial acts, although invested with authority to hear and determine the facts necessary to empower them to do the ministerial act, and although they have passed upon such facts before performing

¹ Bigelow v. Stearns, 19 Johns. 39; *ante*, § 56.

² Dyer v. Smith, 12 Conn. 384.

* Where a justice of the peace, who owned a promissory note, instituted a suit on the note returnable before himself, for the purpose of collecting his own debt, rendered judgment and caused the maker to be arrested and committed to jail, it was held that he was liable for false imprisonment (Dyer v. Smith, 12 Conn. 384). Waite, J. :—"It would be a reproach to the law to allow a man to be a judge in his own case. It is said to be one of the great ends of the institution of civil society to prevent men from being judges in cases wherein they are concerned, and to remit the decision of adverse interests to those who can have no interest whatever in the determination of any such cases" (citing *The Two Friends*, 1 Rob. Adm. R. 237; *Mayor of Hereford's Case*, 1 Salk. 396).

the ministerial act.^{1*} It was early determined in Massachusetts that the issuing of an execution by a justice of the peace was a mere ministerial act, and in a particular instance where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it.² And where a person who had been convicted by a justice of the peace of an assault and battery, after being permitted to go at large for nearly a year, was arrested upon a *mittimus* without a *capias* to show cause why he should not be committed, it was held that the justice was liable in trespass.³ In Michigan, upon a conviction before a justice of the peace, the party was sentenced to pay a fine, with imprisonment for ten days in default of payment. The fine not having been paid, the justice issued his warrant of commitment, reciting therein judgment for the fine, and that in default of payment, the defendant be imprisoned until the fine was paid, or until discharged by due course of law. It was held that as the warrant was not supported by the judgment, it was void, and the justice liable.^{4†}

¹ Pedley v. Davis, 30 L. J. C. P. 374; Newbould v. Coltman, 6 Exch. 189; 20 E. J. M. C. 149.

² Briggs v. Wardwell, 10 Mass. 356; Sullivan v. Jones, 2 Gray, 570.

³ Doggett v. Cook, 11 Cush. 262.

⁴ La Roe v. Roeser, 8 Mich. 537.

* A justice of the peace is liable to an action for false imprisonment for issuing a warrant by virtue of which the putative father of a bastard child is arrested upon the application of an attorney who was not authorized by the overseers of the poor to make the application (Wallsworth v. McCullough, 10 Johns. 93. cited and approved in Sprague v. Eccleston, 1 Lansing, 74).

Although the facts set forth in an affidavit to obtain an order of arrest be slight and inconclusive, yet if they have some tendency to establish the charge, and the justice, after inspecting them issues the order, he will not be liable to an action for false imprisonment therefor, if the other proceedings are regular (Gillett v. Thiebold, 9 Kansas, 427).

† A justice of the peace through personal ill-will, got a constable to serve a warrant for felony nine months after the warrant was issued, the party who caused the warrant to be issued not having made a second application to have it executed; and the constable, also instigated by ill-will, arrested the party against whom the warrant had issued. It was held that an action for false imprisonment would lie both against the justice and constable (Garvin v. Blocker, 2 Brevard, 157).

A warrant issued by a militia officer under the provisions of a statute imposing fines for the neglect of military duty, is a ministerial act, and the officer is liable as a trespasser for mistake as to the law or the issuing of erroneous process (Batchelder v. Whitcher, 9 New Hamp. 239).

Justices are empowered by the 27th section of 9 Geo. 4, ch. 31, to convict of an assault upon complaint, and the "offender upon conviction thereof, before

§ 364. When a magistrate commits a person to prison, in a case in which he has no jurisdiction, he is liable for all the consequences which usually follow from the execution of a warrant of commitment—such as the party being handcuffed, having his hair cut short at the prison, and his being put in a bath there; but not for any violence or excess of the officers.¹ * If, however, one be committed to jail on a sufficient process, that is a defense to an action for false imprisonment, though he at the same time be committed on an irregular or void process—unless it appear by the pleading and evidence that some injury or inconvenience has been caused the plaintiff by the void process.²

14. *Waiver of right of action.*

§ 365. A party may lose his right to maintain an action for the false imprisonment, by being held to have waived the same. In an action for taking the plaintiff on an execution erroneously issued, it appeared that the plaintiff, instead of being discharged from the execution by the defendant, obtained, after a confinement of three months, his liberation under the act for the relief of debtors; and it was held that

them, is to pay such sum, not exceeding £5, as shall appear to them to be meet, which sum is to be paid to some one of the overseers of the poor, or to some other officer of the poor of the parish in which the offense shall have been committed, to be by such overseer or officer paid over to the general use of the rate of the county in which such parish, &c., shall be situate. A conviction under this section ordered the party convicted to pay the fine to the treasurer of the county. It was held that the conviction was bad, and the magistrates liable to an action of trespass at the suit of the party imprisoned under it (*Chaddock v. Wilbraham*, 3 New Sess. Cas. 227; 12 Jur. 136; 17 L. J. 79).

¹ *Mason v. Barker*, 1 Car. & K. 100.

² *Lewis v. Avery*, 8 Vt. 287.

* Where a person, empowered to take testimony, commits, without authority, a witness for refusing to testify, not only he, but all who are present assisting and urging the imprisonment, are trespassers (*Marsh v. Williams*, 1 How. Miss. 132).

Where a magistrate, who has jurisdiction of the person, issues a warrant of commitment upon the complaint of another, for an offense over which he has no jurisdiction, he will not be liable for false imprisonment unless his want of jurisdiction is shown on the face of the proceedings (*Miller v. Grice*, 1 Richardson, 147).

On mesne process, by attachment for debt, issued under the law and authority of the United States, returnable to a court of the United States, to be served on a citizen of the State within the same, a mittimus is necessary to authorize a commitment (*Palmer v. Allen*, 5 Day, 193, Baldwin, J., dissenting).

he had thereby waived the error and affirmed the execution.¹ So, where the defendants, having been arrested under a judge's order, offered bail to the plaintiff's attorneys, and induced them to examine the bail; and the plaintiff's attorneys, at the solicitation of the defendants' attorney, wrote their approval on the undertaking, and the defendants were discharged from custody; it was held that the defendants had waived any objection to having been held to bail.² In Massachusetts, it has been held that, if a person, served with original process, by the wrong christian name, allows judgment to be taken against him by default, he cannot maintain an action against the officer, for his arrest on execution by the same name.³

§ 366. An agreement not to bring an action, if founded on a good consideration, would be binding. Accordingly where after an arrest, a party applied to a judge at chambers, to be discharged out of custody; and it being represented that by his continuing in prison, he would commit an act of bankruptcy, the judge, on the 4th of December, ordered the defendant to be discharged out of custody as to the action, upon giving a fresh warrant of attorney with a defeasance for the payment of part on the 4th of January, and the remainder with interest on the 4th of August, with liberty to issue execution for the first sum, if not duly paid, and afterward for the latter sum if default made in the payment; and upon giving such warrant of attorney, the judgment to be set aside, and a mortgage to remain as security, the defendant undertaking not to bring any action for the imprisonment; and the prisoner did not avail himself of the order; it was held that this order embodied an absolute agreement of the parties, founded upon good consideration, that he should be forthwith discharged out of custody, and that he should bring no action for false imprisonment, and, therefore, that such an action could not be maintained.⁴

¹ Reynolds v. Church, 3 Caines, 274.

² Dale v. Radcliffe, 25 Barb. 333.

³ Trull v. Howland, 10 Cush. 109.

⁴ Wentworth v. Bullen, 9 B. & C. 840.

15. *Nature of the action.*

§ 367. An action for false imprisonment, is an action for a direct wrong or illegal act in which the defendant must have personally participated. It is for having done that which, upon the statement of it, is manifestly illegal; while the ground of the action for a malicious arrest or prosecution, is the procuring to be done what upon its face is, or may be, a legal act from malicious motives, and without probable cause. This distinction is clearly stated in the reasons for the judgment in *Johnston v. Sutton*,¹ as given by Lord Loughborough and Lord Mansfield.* The gist of the action is the unlawful detention. Malice in the defendant will be inferred so far at least as to sustain the action; and the only bearing of evidence to show or disprove actual malice, is upon the question of damages. So also, probable cause or reasonable ground of suspicion against the party arrested,

¹ 1 Term R. 544; and see *Stanton v. Seymour*, 5 McLean, 267.

* Trespass is the proper remedy for false imprisonment. But if the arrest be made on void process, such a process issuing out of a court without jurisdiction, where malice and falsehood are the gravamen of the offense, and the false imprisonment only an incident, trespass on the case may be maintained (*Platt v. Niles*, 1 Edmonds N. Y. Sel. Cas. 230).

An action will lie against one who has either unlawfully arrested or imprisoned another, or who has falsely, that is, unjustly and maliciously, prosecuted him and caused his arrest. But these are different actions requiring different pleadings and evidence, and governed by different rules. The action for unlawfully arresting or imprisoning another, is trespass; while for maliciously prosecuting another, or causing or procuring his arrest, the remedy is by action on the case. The former is the action for false imprisonment; the latter for a malicious prosecution or malicious arrest. In the last two cases, the action is substantially the same, and is governed by the same rules, whether the injury complained of is a prosecution or an arrest. The arrest may be the only act of prosecution. Or there may be an unlawful and malicious arrest in the course of a lawful prosecution; as where a creditor arrests his debtor for a demand upon which he cannot be imprisoned, or for more than is due, or where he is exempt from imprisonment (*Brown v. Chadsey*, 39 Barb. 253, per Emott, J.).

Mr. Chitty (Tr. on Plead. p. 187, 188) says, "that whenever an injury to a person is effected by the regular process of a court of competent jurisdiction, though maliciously adopted, case is the proper remedy, and trespass cannot be maintained; as for example, for a malicious arrest or a malicious prosecution. That no person, who acts upon a regular writ or warrant, can be liable to the action of trespass, however malicious his conduct, but that case for the malicious motive and proceeding is the only form of action (Quoted and approved by Hosmer, Ch. J., in *Watson v. Watson*, 9 Conn. 140, who also cited the following:—*Belk v. Broadbent*, 3 Term R. 183; *Booth v. Cooper*, 1 Ib. 535; s. c. 3 Esp. 135; *Ratcliffe v. Burton*, 3 Bos. & Pull. 223; *Stonehouse v. Elliott*, 6 Term R. 315; *Luddington v. Peck*, 2 Conn. 700; 3 Stark. Ev. 1446).

afford no justification of an arrest or imprisonment, which is without authority of law.¹ As the continuation of an unlawful imprisonment constitutes a new trespass, a recovery in an action brought during the imprisonment, will not bar another action after it has terminated.²

16. *Declaration.*

§ 368. Where a person has been arrested in order to enforce the payment of a tax, the assessment of which was wholly wrongful, he generally has an election to treat the arrest as the immediate cause of the injury, and declare in trespass; or to treat the assessment, upon which the warrant and arrest were founded, as the cause of action. Such are cases where the party was not liable to the assessment of any tax, or where the party making the assessment had no authority to assess a tax. But if the authority exists to assess taxes, and the party was liable to some tax, then trespass may not be a proper remedy.³*

§ 369. The declaration need not allege that the imprisonment was malicious and without probable cause, though malice may be given in evidence to affect the amount of damages.⁴ A declaration which states that the defendants assaulted the plaintiff, and by force compelled him to go to a certain place, where they imprisoned and detained him several hours as a prisoner, is sufficient, without alleging that the acts of the defendants were done illegally or wrongfully, or without competent authority.⁵ When there is a claim of

¹ Brown v. Chadsey, 39 Barb. 253; Burns v. Erben, 40 N. Y. 463.

² Leland v. Marsh, 16 Mass. 389.

³ Little v. Merrill, 10 Pick. 543; Little v. Greenleaf, 7 Mass. 236; The State v. Thompson, 2 N. Hamp. 236; Pease v. Whitney, 5 Mass. 380, 384; Perry v. Buss, 15 N. H. 222.

⁴ Colter v. Lower, 35 Ind. 285. And see Taylor v. Owen, 2 Blackf. 303; Hall v. Rogers, Ib. 429; Wasson v. Canfield, 6 Ib. 406; Poulk v. Slocum, 3 Ib. 431.

⁵ Gallimore v. Ammerman, 39 Ind. 323.

* In Alabama, counts in the forms furnished by the Code (p. 554) for assault and battery and for false imprisonment are both in trespass (Williams v. Ivey, 37 Ala. 242, 244).

special damage, it must be averred, in order that the defendant may have an opportunity to controvert it.¹ The following declaration was held good: That the defendant falsely and maliciously made an affidavit in writing, &c., and upon said affidavit falsely and maliciously caused and procured said plaintiff to be imprisoned by his body, and to be imprisoned, and to be kept and detained in prison for a long time, to wit, for the space of ten days then next following, at the expiration of which said time the said plaintiff, in order to procure his release and discharge from said imprisonment, was forced and obliged to, and did then and there pay to said defendant a large sum of money, to wit, &c., and was thereupon discharged and released from said arrest and imprisonment.²*

17. *Plea justifying arrest without warrant.*

§ 370. A plea justifying an arrest without warrant, on the ground of reasonable and probable suspicion, must allege

¹ Rising v. Granger, 1 Mass. 47; Westwood v. Cowne, 1 Stark. 172; Stanton v. Seymour, 5 McLean, 267.

² Sheppard v. Furniss, 19 Ala. 760.

* A. caused B. to be taken into custody, on suspicion of felony, and taken before a magistrate, who remanded B. for two days, and then discharged him. *Semble*, that B., on a declaration for a false imprisonment (in the usual form), cannot recover for the two days' imprisonment after the remand (Holtum v. Lotun, 6 Car. & P. 726.) Whether he could do so, if it were stated as special damage, *quære* (Ib.).

In trespass for the abduction of the plaintiff's daughter, under twenty-one years of age, the declaration need not allege that the plaintiff thereby lost the services of his child, although there be no evidence of a forcible taking (Kirkpatrick v. Lockhart, 2 Brevard, 276).

Bennus v. Guyldey (Cro. Jac. 505. 506) was an action on the case. The declaration stated that the defendant recovered a judgment against the plaintiff, part of which was afterwards paid, and the residue released; and the defendant covenanted that he would withdraw all process of execution for the same. The declaration further stated that the defendant, intending to vex him, served a *ca. sa.*, returnable 3 Trin. following, which he delivered to the sheriff to execute, who, by force thereof, afterwards, to wit, on the 20th day of July, arrested and detained him, until he paid the amount of the judgment. The defendant pleaded that the sheriff did not arrest by his appointment; to which plea the plaintiff demurred. At the argument, the defendant did not maintain the plea, but took several exceptions to the declaration, one of which was, that it was shown that the sheriff made the arrest on the 20th of July, which was long after the return of the writ; so, it was done without warrant, and was false imprisonment in the sheriff who took him by color of that process, and for that cause principally the declaration was held to be bad by all the court.

the commission of an offense which justified the arrest, and also state the facts which gave rise to the suspicion.¹ * To a declaration in trespass for assaulting the plaintiff and causing him to be taken into a police station, and thence before a magistrate, upon an unfounded charge of having unlawfully attempted to procure from the banking house of the defendant a blank check book, the defendant pleaded that he and certain other persons carried on the business of bankers, under the firm of C. & Co.; that the plaintiff unlawfully endeavored to obtain from C. & Co. a blank check book, by falsely pretending that one T., who kept an account with them, was his master, and had sent him for it; that, in pursuance of such unlawful endeavor, the plaintiff induced one A. to go into the banking house and to ask for a blank check book, saying it was wanted for T., and that A. accordingly did so, and stated that he had been so sent by the plaintiff, and that the plaintiff was waiting outside for it; whereupon the defendant accompanied A. to the place where the plaintiff was waiting, and upon A. stating, in the presence and hearing of the plaintiff, that he had been so sent by him, the defendant, having good and probable cause of suspicion, and vehemently suspecting that the plaintiff had, by such false and fraudulent pretences, as aforesaid, unlawfully endeavored to obtain from the said C. & Co. a blank check book of the said C. & Co., for unlawful and unauthorized purposes, committed the trespass complained of. It was held, that the plea was bad in substance, inasmuch as it neither alleged that a felony had been committed, which alone could make it a good justification at common law,² nor that the plaintiff had committed an offense against the statute,³ so as to justify his arrest without warrant.⁴ So, likewise, where the defendant pleaded that he was an officer, that a felony had been committed, that there

¹ Brown v. Chadsey, 39 Barb. 253.

² *Ante*, § 322.

³ 7 & 8 Geo. 4, c. 29.

⁴ Mathews v. Biddulph, 4 Scott N. R. 54; 1 Dowl. N. S. 216.

* A plea which does not show that the arrest and imprisonment of the plaintiff, which are justified, are the same of which the plaintiff complained, will be bad on demurrer (Gallimore v. Ammerman, 39 Ind. 323).

was reasonable suspicion and belief that the plaintiff had committed said felony, and that, in order to take the plaintiff before a magistrate, he had gently arrested him, the plea was held bad, on demurrer, for not setting forth the facts related to him from which he inferred that the plaintiff was guilty.¹ And where, in an action for false imprisonment, the defendants pleaded that, before the time when, &c., certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due in respect thereof in bank notes of the Bank of England, amongst which was a note for 100*l.*, which was afterward exchanged there for other notes, and amongst them one for 10*l.*, the date and number of which were subsequently altered; that afterward, and a little before the time when, &c., the plaintiff was suspiciously possessed of the altered note, and did, in a suspicious manner, dispose of the same to one A. B., and after, and before the time when, &c., in a suspicious manner, departed and left England, and went to Scotland, and there continued; whereupon the defendants had reasonable cause to suspect, and did suspect, the plaintiff had forged the said receipts, whereupon the defendants gently laid their hands on the plaintiff, and carried him to and detained him in a jail in Scotland, in order that he might be conveyed by a warrant, to be issued by a justice of the county of Middlesex, to be dealt with according to law. It was held, on demurrer, that this plea was too general, it being necessary to show the causes of suspicion with certainty, in order that the court might judge of their reasonableness.²*

§ 371. A plea justifying an arrest without a warrant, on account of an affray, or to preserve the peace, must either aver that there was an affray or breach of the peace at the

¹ *Wasson v. Canfield*, 6 Blackf. 406.

² *Mure v. Kaye*, 4 Taunt. 34.

* *Quære*, whether a defendant, justifying an arrest in Scotland, as made on suspicion of a felony committed in England, must show that the law of Scotland, as well as the law of England, warranted such arrest; or whether, the defendant showing by his plea an arrest made in Scotland which, if made in England, would be warranted, it does not lie on the plaintiff, suing in England, to reply that by the law of Scotland the arrest was not warranted (*Mure v. Kaye*, *supra*).

time of the arrest, or a well founded apprehension of its renewal.¹ Therefore a plea that the defendant was possessed of a house, and that the plaintiff was then making a great disturbance therein, and refused to depart when requested, and was in great heat and fury, ready and desirous to make an affray, and cause a breach of the peace, whereupon the defendant gave the plaintiff into custody, is bad.² So likewise, a plea which averred that the plaintiff committed a breach of the peace by violently knocking for a long time at the door of the defendant's dwelling, and that the plaintiff threatened to continue such knocking until a certain book was delivered to him; that the defendant then sent for a constable, and the plaintiff having ascertained this, ceased knocking and ran off, when the defendant, with the assistance of the constable, immediately pursued the plaintiff and overtook him near the dwelling-house; whereupon the defendant, in order to preserve the peace, and prevent the plaintiff from continuing the disturbance, gave him in charge of the constable, was held insufficient, for the reason that it did not show, either that the breach of the peace was continuing, or allege any facts going to prove that a renewal of the disturbance was to be apprehended.³ So also, where the defendant pleaded that the plaintiff, with force and arms, came to the door of the defendant's house, and with violence, attempted to enter against the will of the defendant, and wilfully and wantonly rang the door bell, without lawful occasion, and made a great noise and disturbance, to the annoyance of the defendant, and against the peace of the Queen, and (after request to cease) continued making such noise, &c., without any lawful excuse; and thereupon the defendant, in order to preserve the peace, and render good order and tranquility in his house, gave the plaintiff in charge to a policeman; the plea was held bad as not showing that, at the time the plaintiff was given in charge, he was

¹ See *ante*, § 324.

² *Wheeler v. Whiting*, 9 Car. & P. 262.

³ *Baynes v. Brewster*, 1 Gale & D. 669; 6 Jur. 392.

committing a breach of the peace, or that there was reasonable ground for apprehending that a breach of the peace would be committed.¹*

18. *Plea justifying arrest under process.*

§ 372. When the arrest is sought to be justified under lawful process, the defense must be specially pleaded. Where therefore, the plaintiff, in the first count of his declaration, alleged a forcible arrest and imprisonment by the defendant in Canada, to which the defendant pleaded the general is-

¹ Grant v. Moser, 5 Man. & G. 123; 6 Scott N. R. 46.

* In the following cases, the plea was sustained:—The defendant pleaded that the plaintiff attempted forcibly to break and enter his messuage or public house without leave of the defendant, whereupon he, the defendant, resisted such entrance; and because the plaintiff behaved himself violently, and created a disturbance in the street, by which means a mob was assembled, and the defendant's business interrupted, and his customers annoyed, and because the plaintiff threatened to continue such violent conduct, and to renew his attempts and efforts to get into the house, and because no request or entreaty of the defendant to the plaintiff to abstain from and abandon his attempts and efforts was complied with, the defendant, in order to preserve the peace, and secure himself from a renewal of such attempts and efforts, gave him in charge to a constable, to be carried before a justice of the peace. It was held, after verdict, that the plea was good (Ingle v. Bell, 1 Mees. & W. 516). A plea of justification, after stating that the defendants were in the lawful possession of a yard, and were there erecting a wall by their servants, averred that the plaintiff entered the yard and upon the wall, and made a great noise, disturbance and affray, ill treated the defendants, threw down their servants so employed, and obstructed the erection of the wall, in breach of the peace; that the defendants requested the plaintiff to depart, which he refused to do; whereupon the defendants and their servants gently removed him, and he violently resisted and assaulted one of the defendants, in so doing; that the plaintiff then and immediately afterward, and just before the said time when, &c., with force, &c., again broke into and entered the yard, and got upon the wall, and again made a great noise, disturbance and affray therein, and threatened to assault, insulted and ill treated, and showed fight to the defendants, and then again forcibly obstructed the further erection of the said wall, and threw down part thereof in breach of the peace; whereupon, the defendants having view of the offenses and misconduct of the plaintiff last aforesaid, in order to prevent such breach of the peace, then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of the plaintiff, to take him before a justice, which the policeman did. It was held that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well founded apprehension that it would be renewed (Price v. Seeley, 10 Cl. & Fin. 28).

The declaration charged an assault and battery of the plaintiff, and taking him into custody along certain streets, and imprisoning him on a false charge of an assault with intent to commit a felony. Plea that the plaintiff having assaulted the defendant, the latter gave the former in charge to a peace officer who took him before a magistrate. Held that the plea was not a sufficient answer (Stammers v. Yearsley, 3 M. & Scott, 410; 10 Bing. 35).

sue, and the plaintiff proved without objection, that the defendant procured a warrant from a magistrate who issued it at his request, and that on this, the plaintiff was imprisoned; it was held that, as no justification under the process was pleaded, none could be insisted upon; but that, as the causing the plaintiff to be arrested, was a substantive act, the proof of which established all that the plaintiff had alleged in his declaration, he was entitled to a verdict.¹*

§ 373. When the defendant pleads a justification of the imprisonment under an order of the court, and undertakes to set out in his plea the facts, the plea must state all the facts necessary to give the court jurisdiction.²† To an action for false imprisonment, the defendant justified under an order of the court of review, that "the plaintiff should stand committed for contempt of that court, in writing, printing, and publishing, a certain printed paper," therein referred to. The plea then stated that "the said order having been so made as aforesaid, the Hon. Sir George Rose, one of the judges of the said court of review, afterward, to wit, &c., at the request of the defendants, and according to the course and practice of the said court of review, made and issued out of the same court, his warrant in writing reciting the order, and directed," &c., for the arrest of the plaintiff. It was held first, that the plea was ill for not showing distinctly that Sir George Rose was one of the judges of the court of review at the time of issuing the warrant; secondly, that it did not appear that a single judge of the court had any

¹ Allen v. Parkhurst, 10 Vt. 557.

² Kettler v. Johnson, 57 Ill. 109.

* Bebee v. Steel, 2 Vt. 314, was an action for false imprisonment, to which the defendant pleaded the general issue and a special justification. An exception was taken to the refusal of the court below to allow the defendant to withdraw the general issue, after the jury were impaneled, and before any testimony was given them. It was held a matter of discretion with the court to allow it, or not, under the circumstances. "If asked for, before the jury were impaneled, it would generally be granted of course; if afterwards, it might be deemed inexpedient; as it would vary the course of presenting the testimony calculated by the plaintiff. At any rate, the allowance or disallowance of such a motion, cannot be assigned for error" (Ib. per Hutchinson, J.).

† When the imprisonment is sought to be justified under a judicial writ, the writ must be set out in the plea in full, or be sufficiently described (Kettler v. Johnson, *supra*).

power or authority by his individual warrant to cause the plaintiff to be arrested for the contempt stated in the plea: and lastly, that these defects were not aided by the allegations with respect to the practice of the court, even if those generally amounted to any averment as to the practice of that court.¹*

§ 374. Where an action is brought against an officer, for an unauthorized and illegal arrest, and the defendant justifies under legal process, he must set forth a due return of it.² The form of the plea of justification, as given by Mr. Chitty,³ is that, at the time and place of return, the defendant returned said writ, and then and there returned thereon, that by virtue thereof he had arrested the said A. B., the plaintiff, whose body he had ready, &c.; it being of course alleged in the plea that this is the same supposed trespass upon which the plaintiff has counted. If the plaintiff would rely upon another arrest, or upon an abuse of his authority, by the officer in making the arrest which

¹ Van Sandan v. Turner, 14 L. J. N. S. 154; 9 Jur. 296.

² *Ante*, § 353; Davis v. Bush, 4 Blackf. 230.

³ 2 Chit. Pl. 591.

* Where, in trespass by A. B., the defendant justified under a *ca. sa.* alleged to have been issued against "the now plaintiff," without otherwise describing him; it was held that the justification was established by the production of a *ca. sa.* against C. B., and proof that in the former action, the now plaintiff was the party sued by the name of C. B. It was further held that the plea would have been more formal if it had alleged that the *ca. sa.* was against C. B., and that the party against whom the *ca. sa.* was issued and the now plaintiff, were one and the same person; and that although it had been alleged that the *ca. sa.* was against C. B. the averment of identity would have been sufficient without averring that the plaintiff was known as well by one name as by the other (*Fisher v. Magnay*, 5 Man. & G. 778).

A defendant, in an action for false imprisonment, pleading a justification under mesne process sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail without setting forth the cause of action (*Belk v. Broadbent*, 3 T. R. 183).

Where several join in the same special justification of trespass and imprisonment they must show a justification for all. "Conceding that the facts set forth in the pleas furnish a good answer for the constable who committed the plaintiff upon the extent, they are no defense to the others; for the pleas do not attempt to connect them with the justification at all by stating that they acted under the constable as aids or assistants, or that they were selectmen or other officers of the town, and put the extent into the hands of the constable, for execution. As they do not show themselves in any way connected with the justification, and have, by joining in the plea, admitted their connection with the trespass on the plaintiff, the pleas are bad as to them, and this renders the pleas insufficient to justify the officer also" (*Clark v. Lathrop*, 33 Vt. 140, per Poland, J.).

is justified, or in his subsequent proceedings, such as to render him liable as a trespasser *ab initio* at common law, this must be set forth by a new assignment, or by a replication alleging the excess of authority.¹

19. *Replication to plea alleging breach of the peace.*

§ 375. If the defendant justifies that he had a right to imprison the plaintiff for a certain reasonable time to preserve the peace, the time is divisible, and the plaintiff may, by his replication, deny that there was any cause for imprisoning him, and if there was, that the imprisonment was for a longer time than was proper. A declaration in a trespass alleged that the defendant on a certain day assaulted the plaintiff and imprisoned him, and kept and detained him so imprisoned for a long time, to wit, for the space of twenty-four hours. The defendants pleaded "as to the said imprisoning the plaintiff, and keeping and detaining him in prison," that the plaintiff made a disturbance in and outside a church during divine service, and committed a breach of the peace, and in order to prevent such disturbance and preserve the peace, the defendants "did a little imprison the plaintiff, and keep and detain him imprisoned for a reasonable time in that behalf, to wit, until he ceased such disturbance and breach of the peace, to wit, for the space of two hours." The plaintiff replied *de injuria*, and also new assigned that the defendants imprisoned him after he had ceased the disturbance and breach of the peace. It was held on special demurrer that the replication and new assignment were not double.²

20. *Replication to plea justifying under process.*

§ 376. A plea justifying under insufficient authority should be traversed by the plaintiff. Where, therefore, in an action for assault and false imprisonment, the defendant

¹ Poor v. Taggart, 37 N. Hamp. 544; 1 Saund. 299, n. 6; 2 Ib. 5, n. 3.

² Worth v. Terrington, 2 Dowl. & L. 352; 13 Mees. & W. 781; 14 L. J. N. S. 133.

justified under a writ sued out by him as attorney for J. M. against the plaintiff, which was delivered to the sheriff, who by virtue thereof arrested and detained the plaintiff, and the plaintiff instead of traversing the plea, as he should have done if the arrest were irregularly made by the sheriff's officer without a sufficient warrant from the sheriff, new assigned that the trespass complained of was upon another and different occasion than that stated in the plea, and after the supposed arrest therein mentioned; it was held that the defendant on proof of the fact as before stated was entitled to a verdict.¹

§ 377. But when the original arrest was lawful, and the plaintiff seeks to recover on the ground of a wrongful re-arrest, he should new assign. Where, therefore, to assault and false imprisonment the defendant justified under a *capias ad respondendum*, and the plaintiff replied that the defendant released him from the arrest, and afterward arrested him again, and prayed judgment because the defendant had acknowledged the trespass, it was held that the plaintiff ought to have new assigned.² The same rule applies in case of unjustifiable detention. Accordingly, where in an action for an assault and false imprisonment, the declaration contained two counts, and the defendant pleaded first the general issue, and secondly, that he and one A. B. being bail for the plaintiff in an action still pending, he (the defendant) seized the plaintiff to render him in discharge of the recognizance entered into by him and A. B., and detained him until he made satisfaction as to the demand for which the action was brought; and the plaintiff replied *de injuria*, and it appeared that the defendant, in addition to detaining the plaintiff until he had made satisfaction for such demand, kept him in custody an hour afterward, and until he paid the expenses incurred by the defendants becoming bail; it was held that the plaintiff ought to have newly assigned in order to recover

¹ Oakley v. Davis, 16 East, 82.

² Scott v. Dixon, 2 Wils. 3.

for that part of the detention and imprisonment which was unjustifiable.¹

§ 378. If the plea seeks to justify a commitment of the plaintiff under a judge's order which the plea avers was made pursuant to the statute, a replication that the judge did not make an order as alleged will be sustained by proof that, although an order was made, it was not authorized by law. In an action for false imprisonment, the defendant pleaded in justification a judgment recovered in an inferior court of record, and an order subsequently made by the judge of that court for the payment of the debt and costs by the plaintiff by instalments, and showing that such instalments were not paid, and that the judge had thereupon ordered the committal of the plaintiff. The plea then alleged that the judge "duly and according to the form of the statute in such case, then and there made a warrant in writing," setting out a warrant of commitment, and averring that the defendant, as the attorney for the judgment creditor, delivered the warrant to the officers, by whom and under which warrant the plaintiff was arrested. To this plea, the plaintiff replied that the judge did not order that the plaintiff should be committed *modo et forma*. The defendant at the trial produced a warrant of commitment corresponding with that described in the plea. But neither the warrant so produced, nor that described, showed on the face of it that there had been any previous summons to the plaintiff to show cause why he should not be committed. It was held that the warrant so produced was invalid, and that the plaintiff was entitled to have the verdict found for him on the issue on the second plea, as that plea to be good must be understood to allege that the judge made a valid order.^{2 *}

¹ Lambert v. Hodgson, 8 Moore, 326; 1 Bing. 317.

² Kinning v. Buchanan, 13 Jur. 812; 18 L. J. C. P. 332.

* In an action for false imprisonment, where the defendant justifies the commitment as a magistrate for a bailable offense in consequence of an information upon oath, the plaintiff under the general replication *de injuria sua propria*, &c., cannot give in evidence a tender and refusal of bail, but ought to have replied it specially (Sayre v. Rockford, 2 W. Black, 1165).

§ 379. A replication to a plea justifying under process, that the process was set aside by a judge's order, must allege the grounds upon which the order was granted. In an action for false imprisonment, the defendant pleaded that he recovered a judgment against the plaintiff, and sued out a *ca. sa.* thereon (the judgment being in full force), under which *ca. sa.* the plaintiff was arrested, &c. Replication that the *ca. sa.*, after the issuing thereof, and before the commencement of the suit, was set aside by a judge's order, not averring the grounds of such order. The replication was held bad on special demurrer, inasmuch as the writ might, under supposable circumstances, have been set aside for reasons which would have been ground of error, and would not, therefore, have prevented such writ, until set aside, from being a justification to parties enforcing it; the replication not negating the existence of such circumstances.¹ To an action for false imprisonment, the defendant pleaded that a judgment was recovered against the plaintiff, and that a *ca. sa.* issued thereon, under which he was arrested. The plaintiff replied that the judgment was signed upon a warrant of attorney, and that the judgment and *ca. sa.* were set aside by a judge's order, which was afterward made a rule of court, on the ground that the warrant of attorney was never delivered as a complete authority to do or suffer any of the acts therein specified, but, as an escrow, to take effect in a certain event which had never happened, and was to be kept by the plaintiff in his own possession until such event should happen; and that the defendant, by an improper contrivance, obtained and kept possession of it, without the plaintiff's consent; that judgment was signed under color of the said document, and the *ca. sa.* issued upon the judgment. It was held, on demurrer, first, that the replication was good, as it sufficiently appeared that the *ca. sa.* was set aside, not on the ground of its being erroneous, but on the ground of irregularity or want of good faith; secondly, that the replication

¹ Prentice v. Harrison, 4 Q. B. 852; Rankin v. De Medina, 9 Jur. 89.

was not bad in omitting to state that the order was made a rule of court before the commencement of the suit, inasmuch as it was not necessary that that fact should be stated; thirdly, that *nul tiel record* would not be the proper replication to such a plea.¹

21. Evidence.

§ 380. Proof must be given of facts and circumstances from which the judge and jury may decide whether there was or was not an unlawful restraint or detention of the person.* It is not enough for witnesses to testify that they considered the plaintiff was in custody, and thought that he was under restraint.² If a party be taken into custody by an officer on a warrant, the signature of which is proved to be in the handwriting of the defendant, a magistrate, this is *prima facie* evidence against the defendant, without further proof, that the warrant was issued by him.³ One of two coplaintiffs in an action in the county court, uttered a threat that he would enforce against the defendant an invalid order of the county court. The defendant was subsequently arrested under a warrant issued upon the order. It was the practice of the county court to give plaintiffs a plaint note to the clerk of the court. It was held in an action for false imprisonment against the plaintiff who uttered the threat, that there was evidence to go to the jury, that he was the person who sued out the warrant.⁴ Where process is issued upon the complaint of a grand juror, the return

¹ Brown v. Jones, 15 Mees. & W. 191; 3 Dowl. & L. 678; L. J. N. S. 210.

² Cant v. Parsons, 6 Car. & P. 504. ³ Mason v. Barker, 1 Car. & K. 100.

⁴ Akley v. Dale, 2 Prac. R. 433; 15 Jur. 1012; 20 L. J. C. P. 233.

* Trespass for assaulting and imprisoning the plaintiff. Plea that he was wilfully breaking down the defendant's fences, wherefore the defendant arrested him and took him before a magistrate. Replication that the plaintiff broke the fences in the *bona fide* assertion of a right of way; without this, that he broke them wilfully, or for any other purpose than in the exercise of his right of way. Rejoinder that the plaintiff was wilfully committing damage and spoil to the defendant's property. It was held that proof of the existence of a right of way over the *locus in quo* was properly received with a view to show the character of the plaintiff's act (Looker v. Halcomb, 4 Bing. 183; 12 Moore, 410).

of the officer is *prima facie* evidence of an arrest under such warrant, as well against the grand juror as against the officer.¹ But when the defendant justifies under a *fi. fa.*, and the plaintiff replies a detention after a bail bond given, an actual arrest must be proved; proof of the execution of the bail bond, coupled with the admission of the trespass in the special plea, not being sufficient.²

§ 381. An allegation in the usual form that the offense was committed with force and arms, does not require proof of actual violence.³ The *gravamen* of the action is the unlawful interference with the person of the plaintiff. And as the general rights of personal liberty are acknowledged and secured by the law, an interference with them is presumed *prima facie* to be unlawful; and the plaintiff has only to prove the fact of such interference to put his adversary upon the defense. The presumption that everything which has been done has been rightly transacted, is encountered and rebutted by the presumption that an actual interference with the person of an individual without his consent, is wrongful. Upon proving such interference in an action where that is the *gravamen*, the plaintiff has proved *prima facie*, all that he has alleged; and in order to justify such an act, the other party must allege in pleading where special pleading is required, and prove where general pleading is allowed, all the circumstances necessary to show a right thus to interfere.⁴ Immaterial allegations need not be proved. Where a declaration which consisted of one count averred that the plaintiff was imprisoned in a shop, a station-house, and at a police office, and the only imprisonment was in the shop, a verdict having been found for the plaintiff, the court declined to order the verdict to be entered as to part of the count for the plaintiff, and as to the residue for the defendant.⁵ So likewise, where in action for false

¹ Allen v. Gray, 11 Conn. 95.

² Reece v. Griffiths, 5 M. & R. 120.

³ *Ante*, 234.

⁴ Perry v. Buss, 15 N. Hamp. 222.

⁵ Myers v. Goodchild, 8 Car. & P. 313.

imprisonment, the defendant pleaded that the plaintiff had stolen feathers from a bed in a ready furnished bed room let to him by the defendant, and that he therefore gave the plaintiff into the custody of a policeman who, because the plaintiff resisted, beat the plaintiff and took him to a station-house; and there was no evidence either of any resistance by the plaintiff, or of any blow given by the policeman, but the other allegation was proved; it was held that the plea was sufficiently established.¹

§ 382. The plaintiff may prove the *animus* of the defendant in committing the act;² and every circumstance is admissible which accompanies and gives character to the trespass.³ The plaintiff, the secretary of a joint stock bank in London, with a bank at D., went with the cashier to the latter place, with a paper purporting to be an order upon the party having charge of the branch bank, to deliver up to them the books and moneys in his custody. The defendant, one of the directors of the bank, seeing a light in the banking house at an unusual hour, went there, and not being satisfied of their authority to act as they were doing, placed the plaintiff and the cashier in the custody of a policeman, who handcuffed them and put them in the cage for the night. In an action for false imprisonment, evidence that the defendant had on the following morning gone to the banking house in London, broken open the desks of the secretary and cashier, and abstracted papers, for the purpose (as was suggested) of depriving them of the means of justifying their conduct, was held to have been properly received.⁴* Conversations with, and threats made to the plaintiff.

¹ Atkinson v. Warne, 6 Car. & P. 687.

² Brushaber v. Stegemann, 22 Mich. 266.

³ Colby v. Jackson, 12 N. Hamp. 526; Bracegirdle v. Orford, 2 M. & S. 77; Woodall v. McMillan, 38 Ala. 622.

⁴ Edgell v. Francis, 1 Scott N. R. 118; 1 Man. & G. 222.

* In Edgell v. Francis, *supra*, the defendant having in mitigation of damages called witnesses to prove that nearly all the money in the bank at the time of the transaction was composed of his own balance, the plaintiff was permitted to cross-examine them generally, as to the existence of bill transactions between the defendant and the bank in London, for the purpose of insinuating that

iff by the defendant previous to the arrest, and statements of the defendant after the arrest concerning his motives, are admissible in evidence against him to show malice.¹

§ 383. If the imprisonment be proved or admitted, the burden of justifying it is on the defendant. Where, therefore, the defendant caused the plaintiff to be apprehended under a justice's warrant, it was held that the plaintiff might maintain the action without producing the warrant.² So, likewise, where in an action against an assessor of taxes, the defendant admitted the imprisonment of the plaintiff, and relied, in his defense, solely upon the tax warrant issued by him and the other assessors; it was held that the burden of proof was on the defendant to show that the whole town had been districted territorially; for unless that had been done, the tax was illegal.^{3 *}

§ 384. For the justification of an arrest by an officer and those acting in his aid, it is not necessary to give other evidence than that furnished by the process of the court valid on its face.⁴ In an action by A. and B., his wife, against C., for the false imprisonment of B., C. justified under an execution against the plaintiffs for costs in a former action brought by them against C., alleging the recovery of the judgment, the issuing of the *ca. sa.*, its delivery to the sheriff, and the

though the local balance was in the defendant's favor, the general balance might be against him. It was held this was no ground for a new trial; and the jury having given 200*l.* damages, it was held not excessive.

¹ Josselyn v. McAllister, 25 Mich. 45.

² Holroyd v. Lancaster, 11 Moore, 441; s. c. 3 Bing. 492.

³ Bassett v. Porter, 10 Cush. 418.

⁴ Henry v. Lowell, 16 Barb. 268; Savacool v. Boughton, 5 Wend. 170.

* In a suit against two, a verdict in favor of one, rendered in a former action brought by him against the present plaintiff, is not evidence to establish one of several facts alleged in justification. In an action for assault and battery and false imprisonment, brought by a sailor against the master and mate of a vessel, the defendants alleged in justification that the plaintiff destroyed a quantity of cheese on board belonging to the mate, and also used insulting language to the mate, and that he was thereupon confined in the run of the vessel. To prove the destruction of the cheese, the defendants offered in evidence the record of a court of competent jurisdiction in an action previously brought by the mate against the sailor for the destruction of the cheese, in which judgment was rendered for the mate; but it was held that such record was not admissible (Ryer v. Atwater, 4 Day, 431).

arrest of B. thereunder. The plaintiffs replied, confessing the recovery of the judgment and the issuing of the *ca. sa., de injuria sua propria absque residuo causæ*. It was held that, as the judgment and writ were admitted on the record, upon the warrant and arrest of B. under it being proved by the plaintiffs, the justification was made out without any evidence on the part of the defendant.¹ * If, however, an officer, in making an arrest, resorts to extraordinary force, and the excess be set up as a ground of recovery, he must show that the force employed was no greater than the nature of the case demanded. Where, in an action of trespass against the sergeant-at-arms of the House of Commons, for forcibly, and with the assistance of armed soldiers, breaking into the mesuage of the plaintiff (the outer door being shut and fastened), and arresting him there, the defendant justified under the speaker's warrant to arrest the plaintiff, a member of the House, for a breach of privilege, to which there was a new assignment of excess in using military force, it was held that evidence of acts of violence of the mob committed in parts adjacent, though out of view and hearing of the plaintiff in his house, if they appeared to be connected with the same purpose as actuated those about the plaintiff's house, might be admitted to show the danger and difficulty of executing the warrant by force against the plaintiff in his own house without the aid and protection of the military.²

§ 385. Where, in an action against an officer, the defendant justifies under an execution issued by a justice of the peace, the plaintiff will not be allowed to prove that the defendant fraudulently served the original process. The judg-

¹ *Newton v. Boodle*, 3 C. B. 795.

² *Burdett v. Coleman*, 14 East, 163; 13 Ib. 27. And see *Burdett v. Abbott*, 5 Dow, 165; 14 East, 1; 4 Taunt. 410.

* Where in an action against a sheriff for false imprisonment, he justifies by virtue of a State's warrant against the plaintiff, a copy of the indictment found against the plaintiff on the charge for which he was arrested is not admissible; nor is the fact that an indictment was found against him admissible, if at all, without proving the whole of the proceedings (*McCully v. Malcom*, 9 Humph. 187).

ment could not be impeached in this collateral way. So far as its validity is concerned, the return of the service of the summons would be conclusive, except on a direct proceeding to reverse the judgment for irregularity. The remedy of the party injured would be either by action for a false return, or by a writ of error.¹

§ 386. Where several are charged, and a portion of the imprisonment was committed before one of the defendants was at all concerned in the transaction, that defendant must be acquitted; or else the evidence must be confined to what took place after that defendant became implicated.^{2*} If in an action of trespass committed by three, with a count for false imprisonment, the trespass is established against all, but the imprisonment against only one, the plaintiff cannot abandon the first trespass proved against all three, and go on with the case as to the imprisonment by the one defendant only.³

§ 387. In an action against a private person for giving the plaintiff into custody on a charge of felony, reasonable and probable cause of suspicion is good evidence in mitigation of damages under the general issue.⁴ It was accordingly held that the fact that the plaintiff, at and shortly before the

¹ Allen v. Martin, 10 Wend. 300; Putnam v. Man, 3 Ib. 202.

² Aaron v. Alexander, 3 Camp. 36.

³ Tait v. Harris, 6 Car. & P. 73; 1 M. & Rob. 282.

⁴ Sugg v. Pool, 2 Stew. & Port. 196; Rogers v. Wilson, Minor, 407.

* If A. imprison B., and in continuation of that imprisonment deliver him into the charge of C., who keeps him in custody, the acts and declarations of C. are evidence against A. in an action for false imprisonment (Powell v. Hodgetts, 2 Car. & P. 432).

In an action against two persons for false imprisonment, a witness for the plaintiff stated that one of the defendants had said before a magistrate that he was authorized by the other defendant. The judge told the jury that what one defendant had said was not evidence, and that they must not allow it to influence their minds, but it was not possible to exclude it, because it was evidence against the defendant who had uttered it. It was held that the caution given by the judge to the jury removed all grounds of complaint as to the reception of the statement (Peat v. Utterton, 2 Jur. 919).

Where on the trial of an action for assault and false imprisonment on a charge of felony, the plaintiff's counsel asked his witness what was said by the defendant when the parties were before the magistrate, it was held that the defendant's counsel might ask on cross-examination what was said by the magistrate (Richards v. Turner, 1 Car. & M. 414).

arrest, was commonly believed to belong to a band of counterfeiters in the neighborhood, might be proved, but that the allegation that the plaintiff belonged to the band and had passed counterfeit money knowingly and with intent to defraud the public, must be specially pleaded.¹ In *Perkins v. Vaughan*,² a bill of exchange, purporting to be accepted by A. B., was presented to him by the defendant for payment, upon which he said that the acceptance had been forged by the plaintiff. Defendant and plaintiff, in company with a policeman, afterward called upon A. B., and the defendant asked him to repeat the charge, which, after some conversation with the plaintiff, he would not do. The plaintiff then brought trespass against the defendant for false imprisonment. The pleas on the record were not guilty and the facts. At the trial, A. B. was not called by the defendant, but the conversation was given in evidence. The jury found for the defendant generally. It was held, on motion for a new trial, that the conversation was rightly received in evidence as part of the *res gestæ*, and also would have been proper under the general issue in mitigation of damages (had the verdict been for the plaintiff), although malice was not the gist of such an action.*

§ 388. The question of reasonable ground of suspicion in actions for false imprisonment, is one of law;³ unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to

¹ *Wasson v. Canfield*, 6 Blackf. 407.

² 6 Jur. 114, C. P.

³ *Hill v. Yates*, 2 Moore, 80; *Bulkeley v. Keteltas*, 2 Seld. 384.

* It will be a justification for an arrest by a private person for felony, that the evidence of the guilt of the accused preponderated; and the defendant may justify the firing of a gun at the accused by proof of its necessity (*Lander v. Miles*, 3 Oreg. 35). Where a plea of justification in such a case states that the plaintiff committed the felony, the jury must try that question in the same way as if they were sitting in the criminal court trying the plaintiff for the offense itself; and if a witness, who admits that he stole similar property at the same time, be called to sustain the plea, though he is not exactly in the situation of an accomplice, yet it seems that his testimony ought to receive some confirmation (*Richards v. Turner*, *supra*).

them the determination of such facts.¹ In *West v. Baxendale*,² a plea justifying the apprehension of the plaintiff on suspicion of felony, set out various circumstances of suspicion, and amongst others, stated a conversation alleged to have been had by the plaintiff with A. At the trial, the whole of the plea was proved, except that the conversation alleged to have been had by the plaintiff with A. was had with B. The defendant applied to the judge to amend the plea, by inserting therein the name of the right person, which was refused. In leaving the case to the jury, the judge told them that they must exclude from their consideration the statement as to the conversation with A., and say whether the facts which were proved, and which were known to the defendant at the time he caused the plaintiff to be apprehended were sufficient to cause a reasonable and cautious man, acting *bona fide* and without prejudice, to suspect the plaintiff of the offense charged. It was held a misdirection, inasmuch as it was leaving to the jury what it was the province of the judge to determine, and that the amendment was one which might have been made upon terms.

§ 389. A reasonable ground of suspicion, induced by circumstances sufficiently strong to lead a cautious person to believe that the charge made was true, would constitute probable cause. In an action for false imprisonment, it appeared that the plaintiff was arrested upon the charge of being about to remove his property with intent to defraud his creditors, and as especially intending to defraud the defendant. The evidence upon which the order for the arrest was granted, was the affidavit of a third party, to the effect that the plaintiff said—when informed by the party making the affidavit of the defendant's intention to bring a suit against him to recover damages for the breach of the agreement—that if the suit was brought, he would take good care and put his means in such a shape that the defendant would get nothing by it; that he would send his means to a mer-

¹ *Burns v. Erben*, 40 N. Y. 463.

² 9 C. B. 141; 19 L. J. C. P. 149.

chant in England, a person known to the plaintiff. On a motion for the discharge of the arrest, the plaintiff explained what he meant by this remark, and the judge, in view of the explanation, and from the additional consideration that the action was one in which nominal damages alone could be recovered, granted the motion. It further appeared that the defendant admitted that the plaintiff had told him that he was indebted to certain persons in England; that a part of the funds which he had (eight or nine thousand dollars), he had obtained from them, a part for two or three years, and a part for five years; and the plaintiff, in his sworn answer, stated that he informed the defendant that he, the plaintiff, had \$10,000 of his own money, and relied on his friend for \$10,000. It was held that the foregoing facts did not make out a want of probable cause.¹ *

§ 390. The defendant, in his evidence in mitigation of exemplary damages, should not be confined to matters which transpired at the very time of the alleged wrong.² In an action for giving the plaintiff in charge to a police officer, the defendant may go into evidence to show that the plaintiff had, for several days, been in the habit of going after him

¹ Gordon v. Upham, 4 E. D. Smith, 9. ² Prentiss v. Shaw, 56 Maine, 427.

* In this case, the court said: "If the defendant had a claim that would enable him to maintain the action, he is to be regarded as a creditor, no matter what amount of damages he might recover; and it cannot be presumed, merely because he did not prosecute the action, or suffered it to go by default, that he had no such claim. * * * The plaintiff's declaration was one that may and would naturally have induced the belief that he intended to dispose of his property, so as to prevent the defendant from collecting anything by a judgment, if he should obtain one. It was sufficient to warrant the suspicion that he intended to do so."

In Miles v. Weston, 60 Ill. 361, it was proved that on the night the plaintiff was arrested, two men had been seen in front of the defendant's house; that when any one came near, they would separate and then meet again; that they did this an hour and a half; that the defendant, becoming alarmed, obtained two policemen; and that as the plaintiff gave no account of himself, but admitted that he had been there two hours, one of the policemen arrested him, and without any direction from the defendant as to what should be done with him after the arrest, he was taken by the officer to the station. The plaintiff testified on the trial that he had been at the place in question but one or two minutes. It was held that the plaintiff's own declaration that he had been there two hours, was sufficient to cause the officer to believe him to be one of two night walkers who had been seen hanging about the defendant's house, and that it ought to go far under the other circumstances of the case in mitigation of damages; if not to justify the arrest.

and annoying him.¹ It may properly be submitted to the jury to find whether the defendant, in causing the arrest of the plaintiff, was actuated by a regard for public justice, or desire that a supposed offender should be punished, or intended to make use of criminal proceedings for his private benefit, to coerce from the plaintiff or his friends the payment of money.² A statement which is averred in a plea of justification to have been made to A., but which was in fact made to B., is admissible to show that the defendant acted with proper motives.³ * A military order which does not amount to a justification, may be given in evidence in mitigation of damages.⁴ Although it will not be a defense that the defendant acted under the advice of counsel,⁵ yet it has been held that the inexperience of the attorney who advised and instituted the proceedings may be proved in mitigation of damages.⁶ †

22. *Damages.*

§ 391. Exemplary damages are only proper when the

¹ Thomas v. Powell, 7 Car. & P. 807.

² Grinnell v. Stewart, 32 Barb. 544.

³ West v. Baxendale, 9 C. B. 141; 19 L. J. C. P. 149.

⁴ Carpenter v. Parker, 23 Iowa, 450.

⁵ Josselyn v. McAllister, 22 Mich. 300.

⁶ Mortimer v. Thomas, 23 La. Ann. 165.

* In trespass for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him (Downing v. Butcher, 2 M. & Rob. 374).

† In an action for causing the plaintiff to be arrested on a charge of stealing oysters from an oyster bed, it was held that the defendant could not, in order to prove good faith on his part, prove the prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to the defendant's knowledge at the time of causing the plaintiff's arrest (Thomas v. Russell, 25 Eng. L. & Eq. R. 559).

‡ Although evidence which ought not to have been allowed, be admitted; yet if it be afterward stricken out, and the jury instructed to disregard it, the verdict, if sustained by the other evidence in the case, will not be disturbed. In *Mandeville v. Guernsey*, 51 Barb. 99, which was an action for assault and battery and false imprisonment, improper evidence was admitted against the objection of the defendant; but afterward, and before the testimony was closed, the judge, of his own motion, ordered the evidence to be struck out, and directed the jury to disregard it. The defendant insisted that the error was not cured thereby, as the evidence might have had an influence upon the minds of the jury. It was held that if the verdict could not be supported except by the evidence in question, the error would be fatal; but that as the questions of fact which were submitted to the jury were found in the plaintiff's favor, he was entitled to recover.

wrong was committed from a bad motive.¹ * Where the defendants, acting under the advice of counsel, erroneously caused the plaintiff to be arrested under a writ of *ne exeat*, it was held not to furnish evidence of malice or wilful misconduct on the part of the defendants, so as to entitle the plaintiff to exemplary damages. And the same was held as to a telegraphic dispatch afterward sent to the judge requesting him not to vacate the writ, or discharge the plaintiff from arrest, until a hearing could be had; and also as to the statement of the defendants, in their depositions, that they were displeased when they heard of the plaintiff's discharge, and did not approve of the action of the judge in discharging him.²

§ 392. But although the false imprisonment was not malicious, yet the plaintiff is entitled to damages for loss of time, interruption of business, and bodily and mental suffering;³ and he may recover more than nominal damages, without alleging or proving special damage.⁴ Where it was proved that the plaintiff was arrested for refusing to testify under a void complaint, that he was taken in charge by the sheriff at the jail, but was not locked in the cell in which he slept, being allowed to visit the rooms of the sheriff, and only prevented from leaving the jail-yard, it was held error in the court to instruct the jury that the plaintiff could only recover nominal damages sufficient to pay him for his loss of time in consequence of the arrest.⁵

§ 393. Although the inconvenience and suffering may have been slight, yet if the wrong was accompanied by personal insult, or by a false charge of a violation of law, exem-

¹ McCall v. McDowell, 1 Abb. U. S. 212.

² Bonesteel v. Bonesteel, 30 Wis. 511.

³ Parsons v. Harper, 16 Gratt. 64.

⁴ Josselyn v. McAllister, 22 Mich. 300.

⁵ Page v. Mitchell, 13 Mich. 63.

* Where, in an action for false imprisonment against a private person, in making an arrest upon strong grounds for suspecting larceny, under circumstances which, though they did not justify the defendant, would have justified an officer, a verdict of \$3,000 was set aside as excessive (Reuck v. McGregor, 3 Vroom, 70).

plary damages may be recovered.¹ Accordingly, where the defendant pleaded that the plaintiff had committed a felony, but at the trial his counsel abandoned the plea and exonerated the plaintiff from the charge, it was held that the putting such a plea on the record ought to be taken into consideration by the jury in estimating the damages.²

§ 394. The plaintiff is entitled to be allowed for what he has been compelled to pay by the wrongful act of the defendant. Where a party, who had been committed to jail for manslaughter by a coroner's warrant, and afterward admitted to bail, subsequently got the inquisition quashed, it was held, in an action by him against the coroner for false imprisonment, alleging as special damage that he had been obliged to pay money to procure his discharge, that he might recover the costs of quashing the inquisition.³* So, likewise, where a party was committed for the non-payment of a penalty in a case where the magistrate had no jurisdiction, and after a part of the imprisonment, he was discharged on the penalty being paid, it was held, in an action for false imprisonment against the magistrate, that the jury might include the amount of the penalty in the damages, if they were satisfied that the plaintiff paid it, or that it was paid in such a way that the plaintiff was liable to repay the amount to the person who actually advanced the money.⁴† In a recent case in

¹ *Fellows v. Goodman*, 49 Mo. 62; *Bauer v. Clay*, 8 Kansas, 580.

² *Warwick v. Foulkes*, 12 Mees. & W. 507; 1 Dowl. & L. 638; 13 L. J. N. S. 109.

³ *Foxhall v. Barnett*, 22 L. J. N. S. Q. B. 7; 18 Jur. 41.

⁴ *Mason v. Barker*, 1 Car. & K. 100.

* In *Foxhall v. Barnett*, *supra*, Lord Campbell, C. J., said: "If the plaintiff had been discharged on *habeas corpus*, instead of being admitted to bail, and had afterwards got the inquisition quashed, I should have thought that he could not have included the cost of quashing in his damages, according to *Holloway v. Turner* (6 Q. B. 928). But here, he was only released from prison upon his giving bail to appear and take his trial. He was still liable to surrender on his recognizances, and was not a perfectly free man until he had got rid of the inquisition. By doing that, he was restored to his original state; but until then, the effects of the wrongful imprisonment were not done away. Therefore, this is damage which flows from the wrongful act of the defendant, and the plaintiff is entitled to retain his verdict for the full amount given."

† A rule having been obtained for discharging a party illegally arrested, it was referred by the court to a judge at chambers, who ordered the applicant to

Wisconsin, the plaintiff alleged, as special damage, that he was obliged to employ counsel to procure his release from imprisonment, at an expense of sixty dollars; and it was held that such special damage might be allowed, although it was not shown that the counsel fee and expenses had actually been paid by the plaintiff.¹ But to entitle the plaintiff to recover for such loss, he must show that it resulted from the injurious act. Accordingly, in an action for assault and imprisonment for one night, brought by a ship's passenger against the captain, it was held that, in order to entitle him to recover the 100*l.* which he paid for his passage home in another vessel, he must prove that he had reasonable ground to fear a renewal of the ill treatment, and that he left the vessel under the influence of such fear.²*

§ 395. Where it appears that the plaintiff, previous to bringing the action, accepted without objection a small sum in satisfaction, and the jury find a large amount of damages, the verdict will be set aside. A beggar, having refused to quit the defendant's premises, the defendant had him arrested, and he remained in custody one night at an inn, and was taken before the defendant the next morning, when he de-

he discharged, and offered to give him the costs of his application, if he would undertake to bring no action for the arrest; but, on his refusal, made no order about costs. An action for trespass and false imprisonment was afterward brought, laying, among other things, as damage, that the plaintiff had been obliged to pay, and had paid, a large sum of money in order to procure his discharge. There was no distinct evidence of payment of the money by the plaintiff to his attorney. It was held, first, that the plaintiff was entitled to recover his costs as special damage in this form of action; but, secondly, that, as the declaration alleged actual payment of them by him, he could not recover that part which he had not paid, but so much only as had been advanced on his account by his attorney, as so much money paid by himself through an agent (*Pritchett v. Boevy*, 1 C. & M. 775; 3 Tyr. 949). *Semble*, that, had the count only alleged that the plaintiff had been forced and obliged and became liable to pay damages for such liability to his attorney, he might have then recovered.

¹ *Bonesteel v. Bonesteel*, 30 Wis. 511. See *post*, § 624.

² *Boyce v. Bayliffe*, 1 Campb. 58.

* In *Boyce v. Bayliffe*, *supra*, it is said to have been held that, in an action for false imprisonment, with an allegation that the plaintiff thereby lost a lieutenancy, he could not recover for the loss, because it was remote. The same is stated in 1 Chitty's Pleading, 440.

The obligor in a void bail bond, in his action for false imprisonment, is not entitled to damages for remaining in the county, according to the terms of the bond (*Fuller v. Bowker*, 11 Mich. 204).

manded compensation, and the defendant told him he might have two sovereigns or go before a justice, and the plaintiff consented to take the money, but said at the same time that he must have something for the keep of his horse, and the defendant then gave him half a crown, and directed the butler to give him some refreshment, and the butler did so, and the plaintiff went away, and then brought an action against the defendant, and recovered 100%.; it was held that the damages were excessive, on account of the limit which the plaintiff himself had put on his demand in the first instance. Tindal, C. J., said: "It seems to me, that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict of 100% is far beyond the merits, as we cannot but see on the evidence of the plaintiff himself, who has set the measure on his own damages."¹*

§ 396. When two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party. The true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass.² A single act of trespass committed by an agent cannot be multiplied by the number of principals who procured it to be done; but the party injured is only entitled to compensation for the damages actually sustained. Where, therefore, several different creditors sued out as many different writs separately against their debtor, without any intention to act in concert, or knowledge that they were so acting, and the same officer served all of the writs at the same time, by arresting the debtor and committing him to jail, it was held that the creditors were joint trespassers, and that satisfaction received by the debtor from one of them would bar an action by him against the others.³

¹ Price v. Severne, 7 Bing. 316. * Clark v. Newsam, 1 Exch. 181; 16 L. J. 297.

² Stone agst. Dickinson, 5 Allen, 29.

* Where a motion for a new trial, on account of excessive damages, in an action for false imprisonment, is overruled, the judgment will not be reversed, unless the damages are flagrantly excessive (Webber v. Kenny, 1 A. K. Marsh. 345).

BOOK III.

TRESPASS IN RELATION TO PERSONAL PROPERTY.

CHAPTER I.

TITLE TO PERSONAL PROPERTY.

1. Property in wild animals.
2. Property in goods where their character has been changed.
3. Property in goods by accession.
4. Confusion or intermingling of goods.
5. When owner of goods estopped from asserting title to them.
6. When property in goods vests in trespasser.
7. Property made chattels by agreement.
8. General rule as to fixtures.

1. *Property in wild animals.*

§ 397. The principles of law governing this species of property are so familiar, that but little need be said on the subject here. We may however be permitted to observe that animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; that if they return to their natural liberty and wildness without the *animus revertendi*, it ceases; but that during the existence of the qualified property, it is under the protection of the law, the same as any other property, and every invasion of it, redressed in the same manner. The Bishop of London having granted to a person a lease of land for a term of years, excepting the trees, and the herons and shovellers making their nests in the trees, the tenant during the lease, took some of the herons. In an action of trespass brought by the bishop against him, it was held that the plaintiff was entitled to recover the value of the herons, he having a qualified property in them, by reason of the trees in which they built.¹

¹ Bishop of London's Case, 14 Hen. 8, f. 1.

§ 398. Deer in a park, rabbits in a warren, or fish in private ponds or tanks, are it is said, the property of man no longer than while they continue in his keeping or possession. Manucapture is not necessary to acquire, much less to continue, possession of this property. If a deer, or any wild animal reclaimed, has a collar or other mark put upon him, and goes and returns at pleasure, it is not lawful for any one else to take him; though if he be long absent without returning, it is otherwise. In all these cases of wild animals reclaimed, the property is not absolute, but defeasible by the animals resuming their ancient wildness; as if the deer escape from the park, or the fish from the pond or tank, and are found at large in their proper element, they become *feræ naturæ* again, and are free to the first occupant that may seize them. But while they continue the owner's qualified property, they are under the protection of the law, as much so, as if they were absolutely and indefeasibly his; and an action will lie for any injury committed. It is clear from the principles above mentioned, that the right to appropriate property of the description in question, does not depend exclusively upon the place where they are found, but upon the fact that they are *feræ naturæ* unreclaimed. For though the deer should be found browsing in his own forest, and the pigeon flying in the air, or any of the class reclaimable at large, if they have been in fact domesticated, and possess the *animus revertendi*, they are not common property, and the occupant who takes them gets no title; and if he takes them knowing their condition, he becomes a trespasser.¹ If a person interferes with another who is trying to catch fish, the latter before he has got the fish into his power or under his dominion and control, has no right of property in or title to the fish, although, excepting for such interference, he would have secured them. Where the plaintiff, while fishing, had nearly surrounded with a net, a multitude of fish, and would have taken all of

¹ Bro. Abr. Property, Pl. 4; *Hadesden v. Gryssel*, Cro. Jac. 195; *Rigg v. Lonsdale*, 1 H. & N. 923.

them, but for the defendant, who came with boats and men, and drove the fish into his own nets and captured them, it was held that the plaintiff had no right to the fish, as he had never had them under his dominion and control, but that he ought to have brought an action against the defendant for interfering with his nets, and unjustifiably preventing the plaintiff from exercising his occupation, and calling of a fisherman and catching the fish.¹ *

§ 399. It has been said, that if A. start game on the grounds of B. and kill it there, it belongs to B.; the property arising *ratione soli*; but that if he pursue it on to the land of C. and there kill it, it belongs to the hunter; though he will be liable to an action of trespass at the suit as well of B. as of C. for hunting on their grounds.²

§ 400. Bees are *feræ naturæ*, but, when hived and re-claimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or enclosing them, gives property in them. They are now a common species of property, and an article of trade; and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant; in other words, to the person who first hives them. But if a swarm fly from the hive of another, his qualified property continues so long as

¹ Young v. Hitchens, 6 Q. B. 606.

² Bl. Com. v. 2, p. 419; Sutton v. Moody, 1 Ld. Raym. 250; 2 Salk. 556; Churchward v. Studdy, 14 East, 249.

* In Littledale v. Scaith, 1 Taunt. 243, *n. a.*, which was an action of trover for a whale which had been struck by a harpooner of the plaintiff's ship, it was agreed that the law, both by the custom of Greenland, and as settled by former determinations at Guildhall, London, was as follows: while the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time, struck by a harpooner of another ship, and though she afterward breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.

he can keep them in sight and has power to pursue them.¹ * A man's finding bees in a tree standing upon another man's land, gives him no right either to the tree or the bees.² Where bees, which have been reclaimed, occupy a tree on the land of another, and the owner of the land cuts the tree down, destroys the bees, and takes the honey, an action of trespass therefor may be maintained against him by the owner of the bees, although the latter cannot enter upon the land to retake the bees without subjecting himself to an action of trespass.³

2. *Property in goods where their character has been changed.*

§ 401. Where a person takes away an article belonging to another, without authority, and alters or improves it, he cannot lawfully detain it from the owner until his alterations and improvements have been paid for. If my carriage, without any authority from me, is sent to a coach-maker to be repaired or painted, I have a right to the possession of it, without paying for the repairs or painting.⁴ Materials delivered to a person for the purpose of being manufactured, still continue the property of the original owner, although their nature and character be essentially altered by the process, and their value largely increased. In such cases there is no contract of sale and no act done which divests the property of the original owner. It is merely a contract between a principal and an agent, or employer and employee, the former having the title to the property, and the latter a claim to compensation for his labor. The mode in which this compensation is paid, whether by a right to sell on the part

¹ Goff v. Kilts, 15 Wend. 550.

² Merrills v. Goodwin, 1 Root, 209; Gillet v. Mason, 7 Johns. 16.

³ Goff v. Kilts, *supra*.

⁴ Hiscox v. Greenwood, 4 Esp. 174.

* Blackstone (2 Com. 293) inclines to the opinion that, under the *Charter of the Forest*, allowing every free man to be entitled to the honey found within his woods, a qualified property may be had in bees, in consideration of the soil whereon they are found, or an ownership *ratione soli*. According to the civil law (Just. Inst. Lib. 2, Tit. 1, s. 14), bees which swarm upon a tree are not private property until actually hived, and he who first encloses them in a hive becomes their proprietor.

of the agent and to deduct it from the proceeds, or by a direct payment of it by the principal, is immaterial. In either case the title to the property remains unchanged.¹

§ 402. By the civil law, personal property must have been taken away in ignorance of its being the property of another, and be changed into a different species, before the owner could lose his title. A wilful wrong-doer acquired no property in the goods, either by the wrongful taking, or by any change wrought in them by his labor or skill. In the digest of Justinian² it is said: "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce the said wine, oil, or garments." So, in Vinnius' Institutes:³ "He who knows the material is another's, ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor." The same principle is stated by Puffendorf, in his *Law of Nature and of Nations*, and in Wood's *Institutes of the Civil Law*.*

¹ *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. 177; *Mitchell v. Stetson*, 7 Cush. 435.

² Lib. 10, Tit. 4, Leg. 12, § 3.

³ Tit. 1, Pl. 25.

* In Puffendorf's *Law of Nature and of Nations*, Book 4, ch. 7, § 10, it is laid down that, "In all cases it is to be inquired whether the person who bestows a shape on another's matter, doth it with an honest or with a dishonest design. For he who acts thus, out of a knavish principle, can by no means pretend that the thing belongs to him, rather than to the owner of the matter—though all the former reasons should concur—that is, though the figure should be the most valuable; though the matter should, as it were, be lost and swallowed up in the work; and though he should be in very great want of what he had thus compacted. For the greater part of the two doth not draw to itself the less, barely by its own virtue or on its own account; but there is required farther some probable ground and plea in the owner of that part which exceeds, on which he may build his claim. Hence, if a man, out of wilful and designed fraud, puts a new shape on my matter, that he may, by this means, rob me of it, he neither gains any right over the matter by this act, nor can demand of me a reward for his labor, any more than a thief who digs through my walls can claim to be paid for his great trouble in making a new door into my house; or than one that breaks an imposthume, otherwise incurable, with a blow that he designed for my death; or than Autolycus could have asked a price for painting the horses which he first stole. And all this doth not proceed from any positive constitutions, but from the very dictate and appointment of natural reason, though nature doth not determine any particular penalty in the case. For to have exercised such a villainy gratis is not properly a punishment; and, on the

§ 403. The common law rule seems to have been borrowed from the Roman law at an early day, at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise, compiled in the regn of Henry III, adopted a portion of Justinian's Institutes on this subject, without noticing the distinction between an innocent taker and a wilful wrong-doer. And Blackstone,¹ in stating what the Roman law was, follows Bracton.* In England,

other hand, it is most just and reasonable that I should not be obliged to pay a man wages for endeavoring to do me a mischief."

Wood (Inst. of Civil Law, p. 92) states the doctrine on the subject thus: "He that made the new species shall be master of the whole if it cannot be reduced to its first state and condition; as when one shall press wine from your grapes, or build a ship from your timber, you cannot claim the wine or the ship. But this determination only takes place in favor of the workman, where the work was designed for his own use, and where he erroneously and by mistake thought the matter was his own. For if it was intended for the use of another, it is his upon the same terms for whose use it was making. And if it is known that the grapes and timber are another's, and yet thereof he proceeds to make his wine or ship, he shall lose his labor and workmanship. The whole shall accrue to the owner, and an action may be maintained against him."

In Bown's Civil and Admiralty Law, p. 240, the civil law is stated to be that the original owner of anything improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species, however, must be incapable of being restored to its ancient form; and the materials must have been taken in ignorance of their being the property of another.

¹ 2 Bl. Com. 404, 405.

* The authorities to which Blackstone refers in support of his text are three only. The first in Brookes' Abridgment, Tit. Property, 23, is the case from the Year Book, 5 H. 7, fol. 15, in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather, and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them, as he lawfully might. The plea was held good, and the title of the owner of the leather unchanged. The second reference is to a case in Moore's Reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterward gave it to the plaintiff, and that the defendant therefore took the timber, as he lawfully might. In these cases, the chattels had passed from the hands of the original trespasser into the hands of a third person. In both, it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state, against the third person in possession. They are in conformity with the rule of the civil law. The third example which is from Popham's Reports, p. 38, was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass, and it was adjudged that the whole should go to the defendant. Blackstone refers to this case in support of his text that "our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded, and endeavored to be

the decisions on the general subject commenced as early as the Year Book, 5 H. 7, folio 15; and it was held, after argument on demurrer, that whatever alteration of form any property had undergone, the owner might seize it in its new shape if he could prove the identity of the original materials. * According to the rule thus established, if the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it—as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool—the manufactured article still belongs to the owner of the original material, and he may retake it, or recover its improved value in an action for damages, and the rule holds good against an innocent purchaser from the wrong-doer, although the value may have been increased by the labor of the purchaser. If, however, a chattel wrongfully taken afterward goes into the hands of an innocent holder who, believing himself to be the owner, converts the chattel into a thing of a different species, so that its identity is destroyed, the original owner cannot reclaim it, but is put to his action for

rendered uncertain without his own consent.” The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share (Just. Inst. Lib. 2, tit. 1, § 28); and the common law, in this respect, seems to be more rigorous than the civil law.

* “There is great confusion in the books upon the question what constitutes change of identity. In one case (5 Hen. 7, fol. 15), it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this, in many cases, is by no means the best evidence of identity, and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely, and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Moore’s R. 20), trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, ‘because the greater part of the substance remained.’ But if this were the true criterion, it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others, which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone, as the case of leather made into a garment, logs into timber or boards, cloth into a coat,” &c. (Ruggles, J., in *Silbury v. McCoon*, 3 N. Y. R. 379).

damages as for a thing consumed, and may recover the value of the chattel as it was when the conversion or consumption took place.¹ The New York Supreme Court decided that the rule of the civil law, that where goods are taken by a wilful trespass the title is not changed, however great may be the alteration of the original materials, had not been adopted in that State.² But the court of last resort, in reviewing the judgment of the Supreme Court, held that if the plaintiffs below, in converting corn into whisky, knew that it belonged to another, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which, although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to the original owner.*

3. *Property in goods by accession.*

§ 404. It is a general rule of law that the owner of property, whether it be movable or immovable, has the right to that which is united to it by accession or adjunction. Where, for instance, the agent of the owner of a mill put his own mill stones and mill irons into the mill, it was held that they thereby became a part of the freehold, and that the agent had no right to sever them, and that the agent's creditors could not take them for his debts, although the mill had been destroyed, and they alone were left.³†

¹ See 2 Kent's Com. 363.

² Silsbury v. McCoon, 4 Denio, 332; s. c. 6 Hill, 425; 3 N. Y. 379.

³ Goddard v. Bolster, 6 Maine, 427. And see Mitchell v. Stetson, 7 Cush. 435.

* The rule referred to in the text has been adopted in Pennsylvania (Snyder v. Vaux, 2 Rawle, 423); and in Maine and Massachusetts it has been applied to the wilful intermixture of goods (Wingate v. Smith, 7 Shepl. 287; Ryder v. Hathaway, 21 Pick. 298; Willard v. Rice, 11 Metc. 493). Where a trespasser cut down timber and converted it into coal on the owner's land, and in action for the trespass the value of the timber, and a counter demand of the defendant for the coal, were submitted to the jury, who found a verdict for the plaintiff, it was held that as the coal remained in the possession of the owner of the timber, the defendant acquired no property in it (Curtis v. Groat, 6 Johns. 168; citing Betts v. Lee, 5 Johns. 343. See 6 Hill, 427; 4 Denio, 334).

† Goddard v. Bolster, *supra*, was an action of trespass for entering on the plaintiff's land and carrying off his mill stones and mill irons. It was proved

4. *Confusion or intermingling of goods.*

§ 405. If one man so confounds the goods of another with his own that they cannot be distinguished, he must himself bear all the inconvenience of the confusion, and it is for him to distinguish his own property or lose it.¹ "If a goldsmith be melting gold in a pot, and as he is melting it I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, but have lost it; and if a man take my garment and embroider it with silk or gold, or the like, I may take back my garment; but if I take the silk from you, and with this face or embroider my garment, you shall not take my garment for your silk which is in it, but are put to your action for my taking the silk from you."² Where the plaintiff, at play, thrust his money into the defendant's heap, and so intermingled the coins that it became impossible to separate them, it was held that the whole heap belonged to the defendant.³ And where a person bought mortgaged goods in order to defraud the mortgagee, and then mingled them with his own goods so that the two could not be distinguished, and refused to separate them, it was held that the mortgagee might lawfully take some of them with his own.⁴ In Michigan, where a

that the plaintiff bought the premises some twenty years previous as a home for his brother Robert, and that the latter always occupied and used the same as though they were his own; that when Robert went there to live there was a grist mill on the premises, which, being subsequently burnt, it was rebuilt by Robert, and he put into it his own mill stones and mill irons; that Robert occupied this second mill as his own for several years, and until it was destroyed by a flood; that he then took the mill stones and irons out of the river, sold some of them and left the balance on the premises by the side of the road, where they remained until they were taken on an execution against Robert by the defendants, who were his judgment creditors. The judge charged the jury that the mill, when rebuilt, belonged to the plaintiff, who would be holden to Robert for the value of any materials or labor furnished by him, and that the parts after the mill was destroyed continued to be the plaintiff's property. A verdict having been found for the plaintiff, the Supreme Court directed judgment to be entered on it.

One who, without license, enters upon government land, cuts down trees, and converts them into wood, acquires no title to the wood by the doctrine of accession (*Brook v. Smith*, 14 Ark. 431).

¹ 2 Kent's Com. 365; *Story on Bailm.* § 40; *Hart v. Ten Eyck*, 2 Johns. Ch. R. 62; *Lupton v. White*, 15 Ves. 432.

² *Anon. Popham*, 38.

³ *Ward v. Eyre*, 2 Bulstr. 353.

⁴ *Ful'ner v. Paige*, 26 Ill. 358.

person wrongfully mingled his own saw logs with those of another, it was held that the latter might seize all of the logs if he could do so without violence, and that he was not liable for the accidental destruction of the property while thus in his possession.¹ * In Maine, where a person found his timber, which had been wrongfully taken from his land, mingled with other timber so that it could not be distinguished, it was held that he could lawfully take possession of the whole, even if afterward obliged to account to the true owner for a portion of it.² †

§ 406. If the intermingling of goods be wilful, and without the consent of the other, and the articles are of such a nature that they cannot be distinguished and separated, the civil law gives the whole to the one not consenting to the mixture, but allows a satisfaction to the other. But the common law gives the whole to the one not consenting, without compensation to the other. This, however, is to be carried no further than necessity requires; and it seems to be understood that if the articles so mingled are of the same

¹ Stephenson v. Little, 10 Mich. 433.

² Bryant v. Ware, 30 Maine, 295.

* In Stephenson v. Little, *supra*, Campbell, J., dissenting, held that the wrong-doer had a right to his share when the logs were of a uniform value.

† In Loomis v. Green, 7 Maine, 386, which was an action for certain pine logs, the defendant claimed the logs under a bill of sale of them made to him by the treasurer of Dartmouth College. It appeared that Loomis cut certain logs, without authority, on the college lands, put upon them his private mark, and deposited them in the Dead Diamond river, a tributary stream of the Androscoggin; and that he, at the same time, owned a small quantity of logs which he acquired by purchase, on the Magalloway river, also a tributary stream entering into the Androscoggin, on which he also put the same mark; and that both parcels were floated down said last-mentioned river for upwards of one hundred miles by the current, without any particular superintendence. The plaintiff contended that the burden of proof was on the defendant to show that the logs he took were not those purchased on the Magalloway by the plaintiff, but that they were those cut on the college lands and floated down the Dead Diamond river. But it was held otherwise. As the plaintiff had marked the logs cut on the college lands, which were the property of the trustees, with the same marks as those which he owned on the Magalloway, and turned the whole into the Androscoggin, so that they might go down promiscuously, he had effected what the law terms a confusion of goods; and this having been done wilfully, and without the mutual consent of the owners of both parcels, it is for the party creating the confusion to distinguish his own property satisfactorily, or lose it.

The placing of crockery, china, or other articles resembling each other on the same shelf, is not a confusion of them within the meaning of the law (Treat v. Barber, 7 Conn. 274).

kind and of equal value, the injured party may take his given quantity, and not the whole.¹

§ 407. When the confusion or commixture of goods is made with the consent of the owners, or by accident, or by the inadvertence or negligence of one of the owners, and the goods are of such a nature that they can be identified and separated—as if A. mixes some of B.'s cattle, sheep, horses, wood, or furniture, with his own, erroneously supposing that they belong to him—the property of each remains as before; and when, although the identity remains, they cannot be distinguished, each owner is entitled to his share.²* Where the wood of two persons became intermingled and indistinguishable, without the fault of either, it was held that they became tenants in common of the wood, each being entitled in the joint property to the number of cords of which he was the owner previous to the confusion of the wood.³

§ 408. If goods while mingled with others, be sold by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. The reason is, that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. But if the goods sold are clearly identified, then, although it may be necessary to

¹ 2 Blk. Com. 405; Browne's Civil Law, 243; Willard v. Rice, 11 Metc. 493; Beach v. Schnultz, 20 Ill. 185; Gilman v. Sanborn, 36 N. Hamp. 311; Ryder v. Hathaway, 21 Pick. 298; Seavey v. Dearborn, 19 N. Hamp. 351; Barron v. Cobleigh, 11 Ib. 557; Hyde v. Cookson, 21 Barb. 92; Silsbury v. McCoon, 3 Comst. 379.

² Story on Bailment, § 40; Platt v. Bryant, 20 Vt. 333; Moore v. Bowman, 47 N. Hamp. 494.

³ Moore v. The Erie R. R. Co. 7 Lans. 39.

* A., a machinist, was allowed to use with his own tools and machinery a quantity belonging to B., in consequence of which those of B. became intermingled with his own, so that it was difficult to distinguish the one from the other. B. sold to C. such of the articles as belonged to him, without however specifying or enumerating them; but A. would not allow C. to take them away. Thereupon B. sent workmen to remove the property, but did not point it out to them or state what articles it comprised. In an action of trespass by A. against B., it was held that B. was not liable for the act of the workmen in removing accidentally with the articles sold other similar ones belonging to A. (Rose v. Gallup, 33 Conn. 338).

number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done as upon the object to be attained. If that is specification, the property is not changed. If it is merely to ascertain the total value at designated rates; the change of title is effected.¹

5. *When owner of goods estopped from asserting title to them.*

§ 409. When any one by his conduct causes the belief, or by his silence admits another to be the owner of property, so that a third person, in acting upon the representation, assumes responsibility, or parts with value, he cannot afterward aver his own title to the injury of such person.² Where an insolvent debtor falsely and fraudulently pretended that the goods belonging to him and in his possession were the property of one Madden, the lease of the store being in the name of Madden, and his name upon the awning, it was held that such debtor could not enforce his claim to the goods against a creditor of Madden who had levied upon them.³ * But the rule that of two innocent persons, he who has parted with the possession of his property must yield to a *bona fide*

¹ Crofoot v. Bennett, 2 N. Y. 258.

² Thompson v. Blanchard, 4 Com. 303; Deezell v. Odell, 3 Hill, 215; Hibbard v. Stewart, 1 Hilton, 207.

³ Rigney v. Smith, 39 Barb. 383.

* Holt v. Johnson, 14 Johns. 425, was an action of trespass brought by Johnson in a justice's court against Holt for taking a horse from the plaintiff. The plaintiff proved that the horse being in charge of one Soule, his tenant, as bailiff for the defendant, he distrained the horse for rent in arrear; that after the horse was taken, Soule, who claimed to own him, consented that the plaintiff might take him home and use him for his keeping until the day of sale, and while the horse was thus in the possession of the plaintiff, the defendant took him away. The Supreme Court affirmed the judgment, which was for the plaintiff.

purchaser from the man to whom such possession is confided, has hardly ever been applied, except when the owner either transferred the legal title with the possession, reserving or raising a trust, or furnished such unequivocal *indicia* of absolute ownership with the possession, as to mislead the purchaser. The latter advancing his money, and taking without notice of the trust, or in confidence of appearances, shall then hold. In the first case, the legal right is allowed to prevail against the equitable; and in the latter, the original owner is estopped to gainsay the language held by the *indicia* of ownership. In the first, the legal right is allowed to override the lurking equity; in the second, the owner is himself forbidden to practice a fraud.¹

§ 410. Mere possession will not give the vendee of the possessor a title to the goods as against the true owner, even though the vendee be a *bona fide* one, without notice of the rights of the owner. If it would, one who leaves his watch at a watchmaker's to be repaired, or keeps his horse at a livery stable, or who lends his watch or horse to another for a short period, would be liable to be divested of his property through a sale by the temporary possessor. But if one intrust another with both the possession and the *indicia* of the right of disposition, then a sale by the possessor will vest the title in his *bona fide* vendee without notice. The mere giving of the possession of goods to one whose general and acknowledged business is not that of a sale of such goods, although he may be incidentally concerned in the purchase and sale of such goods, does not transfer to him the external *indicia* of the right of disposition. So likewise, if one carries on two distinct branches of business—*e. g.*, repairing watches for others, and buying and selling watches on his own account,—an owner of goods who delivers them to him by reason of his carrying on one branch, does not give him the external

¹ Ash v. Putnam, 1 Hill, 303.

indicia of the right of disposition by reason of his carrying on the other branch.¹ *

6. *When property in goods vests in trespasser.*

§ 411. Although when a trespasser takes a chattel into his possession, and the plaintiff recovers damages for the specific chattel so taken, the recovery and satisfaction of judgment, change the property by operation of law; yet this only occurs where the amount, paid by the wrong-doer, includes the value of the article for the taking of which the action is brought.² † It was accordingly held, that the settling of an action for trespass in cutting down timber, by the payment of damages therefor, did not transfer to the trespasser, a right to the timber cut down and remaining on the land, although he had worked the timber up into shingles.³ So likewise, where in an action by the Trustees of Dartmouth College against one Loomis, for cutting on their land, pine timber trees, Loomis having admitted their right to the trees, they abandoned so much of their suit as was for the recovery of the value of the timber, and prosecuted it for the injury sustained by the entering and cutting only, and judgment was entered in their favor for nominal damages, it was held that by this judgment, the title to the timber was not changed.⁴

7. *Property made chattels by agreement.*

§ 412. The customary distinction between real and

¹ *Saltus v. Everett*, 20 Wend. 267; aff'd s. c. 15 Ib. 474; *Covill v. Hill*, 4 Denio, 323; *Ely v. Ehle*, 3 Comst. 506; *Linnen v. Cruger*, 40 Barb. 633.

² *Fox v. Northern Liberties*, 3 Watts & Serg. 103; *Jones v. McNeil*, 2 Bailey, 466; *Goldsmith v. Stetson*, 39 Ala. 183; *Thurst v. West*, 31 N. Y. 210.

³ *Betts v. Lee*, 5 Johns. 348.

⁴ *Loomis v. Green*, 7 Maine, 386.

* Where shingles, which were made and left on vacant land, were carried away without the owner's knowledge or consent, it was held that he might maintain an action of trespass therefor, although they were taken with the permission of one to whom the land was conveyed before their removal (*Reader v. Moody*, 3 Jones Law, N. C. 372).

† The payment of a judgment rendered in an action for taking and carrying away goods vests the property in them in the defendant, although part of the goods belonged to the plaintiff's wife before marriage (*Schindel v. Schindel*, 12 Md. 108).

personal property, cannot in general, be abrogated by the agreement of the parties. It may however be done in relation to things which being originally personal in their nature, are attached to the realty in such manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to the things real, with which they are connected; though their connection with the land, or other real estate is such, that in the absence of an agreement, or of any special relation between the parties in interest, they would be a part of the real estate.¹ It is well settled that erections which, by the general rules of law, would belong to the freehold, may become personalty by agreement between the owner of the land, and the party claiming the erections.

§ 413. But where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in question; although rights by way of license may be created in it, yet it cannot be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. A house, for instance, which cannot be removed without practically destroying it, cannot be made a chattel by agreement; and the same is true of the bricks, beams, or other materials of which the walls of the house are composed, and which are essential to its support.*

8. *General rule as to fixtures.*

§ 414. The old rule of law seems to have been that whatever was annexed to the freehold became part of it, and could

¹ Ford v. Cobb, 20 N. Y. 344.

* In Fryatt v. Sullivan Co. 5 Hill, 116, a certain steam engine and boiler were leased, and the lessees took them to their smelting works, and affixed them so firmly to the freehold that they could not be removed without destroying the building in which they were placed. The defendants made title to the building under a mortgage executed after the engine had been thus annexed, and the owner of the engine and boiler brought trover for them. It was held that the articles had been converted into real estate, and that the remedy of the plaintiff was against the party who wrongfully converted them from personal into real property; and that the action could not be sustained against the owners of the real estate (Affirmed 7 Hill, 529, Approved in Ford v. Cobb, *supra*).

not be taken from it, understanding "annexed to the freehold" fastened or connected with it. So that mere juxtaposition, or the laying of an object, however heavy, on the freehold did not amount to annexation.¹ Cases of constructive annexation were early recognized, in which an object really a chattel was, for certain purposes, considered as annexed to the freehold. Thus, in *Liford's case*,² it is said to have been resolved in *Winstow's case*, of *Gray's Inn*,³ that if a man has a horse mill, and the miller take the mill stone out of the mill to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill, as it had always been lying upon the other stone, and by consequence, by the lease or conveyance of the mill, it shall pass with it. In *Regina v. Wheeler*,⁴ upon a motion to stay process for seizing the wheel of a mill as a deodand, and because it was parcel of the freehold, Lord Chief Justice Holt is reported as saying: "A mill is a known thing in law, and so are the parts thereof, and, therefore, if the owner of a mill take out one of the mill stones to pick or gravel it, and devise the mill, while the stone is severed from it, yet it shall pass as part of the mill." On this ground process was stayed. The same was held as to doors, windows, rings and keys, although they are distinct things; and so, also, as to heirlooms, charters, and evidence attendant upon the inheritance, and the deer and fish in a park or fish pond.⁵

§ 415. The question as to whether or not certain things are to be deemed fixtures is now made to depend not upon the fact of their being affixed or fastened to the land, but upon their evident purpose and adaptation for ornament or use in the situation and manner in which they were located and constructed.⁶ It has been well said that "A thing may

¹ Buller's N. P. 34; *Wadleigh v. Jauvrin*, 41 N. Hamp. 503; *Anthony v. Hauey*, 8 Bing. 186; *Horn v. Baker*, 9 East, 215; *Davis v. Jones*, 2 B. & A. 165.

² 6 Coke, 50.

³ 14 H. 8, 25 b.

⁴ 6 Mod. 187.

⁵ *Amos & Ferrard on Fixtures*; 2 Kent's Com.; *Walker v. Sherman*, 20 Wend. 626.

⁶ *Powers v. Dennison*, 30 Vt. 752.

be as firmly affixed to the land by gravitation as by clamps or cement." Its character may depend much upon the object of its erection. The intention of the person making the erection often exercises a controlling influence, and its connection with the land is looked at principally for the purpose of ascertaining whether the intention was that the thing in question should retain its original chattel character or was designed to be made a permanent accession to the land.¹ Although in erecting a dwelling its doors, windows, blinds and shutters become a part of it, and the manner of annexation is of no particular consequence, yet there must be actual or constructive annexation in order to make them a part of the building. Where at the time a person conveyed to another a house and premises, the building had in it all the windows, it was held that the mere fact that the grantor had made some sash, painted them, and set glass in them, intending to use them at some future time in the construction of double windows for the house, did not constitute constructive annexation.² In *Winslow v. The Merchants' Ins. Co.*,³ where the inquiry was whether a steam engine and other machinery of a manufactory were to be considered as fixtures, and had vested as such in the defendants under a mortgage of the building prior to the period when they were erected, in opposition to the claim of the plaintiffs under a subsequent specific mortgage of the machinery itself, the court held that this point was to be determined not by the fact whether or not the machinery was affixed to the building, but whether it was permanent in its character and essential to the purposes for which the building was occupied.* In a case in New York,

¹ *Snedeker v. Warring*, 12 N. Y. 170.

² *Peck v. Batchelder*, 40 Vt. 233.

³ 4 Metc. 306.

* "The rule that objects must be actually and firmly affixed to the freehold to become realty, or otherwise be considered as personalty, is far from constituting a criterion. Doors, window blinds and shutters, capable of being removed without the slightest damage to a house, and even though, at the time of a conveyance an attachment or a mortgage, actually detached, would be deemed, we suppose, a part of the house and pass with it. And so, we presume, mirrors, wardrobes, and other heavy articles of furniture, though fastened to the walls by screws with considerable firmness, must be regarded as chattels. In general

the Court of Appeals held, reversing the decision of the Supreme Court, that a statue erected as an ornament to grounds may be a part of the realty, although not fastened to the base on which it rests and capable of being removed without fracture; and also, that a sun dial erected without being in any way fastened, upon a permanent foundation of stone in the same grounds, was a part of the real estate, although it weighed only two hundred pounds, and could readily be removed.¹ In the same case, the court disregarded as incompetent and immaterial the testimony of the former owner of the statue, that when he set it up he did not design it as a permanent erection, but intended to sell it whenever an opportunity should offer. *

terms, we think it may be said that when a building is erected as a mill, and the water works or steam works which are relied on to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, though not at the time of the conveyance, attachment or mortgage attached to the mill, they are yet parts of it, and pass with it by the conveyance, mortgage or attachment." Shaw, C. J., in *Winslow v. The Merchants' Ins. Co.*, *supra*. By the civil law, columns, figures and statues used to spout water as fountains were regarded as immovable or real, though it was inferred that statues resting on a base of masonry were not immovable, because they were there, not as part of the construction, but as ornaments (Pandects, Lib. 19, § 17, vol. 7, by Pothier, 107). By the French law, statues placed in a niche made expressly to receive them, though they could be removed without fracture or deterioration, are immovable or part of the realty (Code Nap., § 525). But statues standing on pedestals in houses, court yards and gardens, retain their character of movable or personal (3 Toullier, Droit Civil de France, 12). This has reference to statues only which do not stand on a substantial and permanent base or separate pedestal made expressly for them. For when a statue is placed on a pedestal or base of masonry constructed expressly for it, it is governed by the same rule as when placed in a niche made expressly to receive it, and is immovable (2 Repertoire Journal du Palais, by Ledru Rollin, 518, § 139). The statue in such case is regarded as making part of the same thing with the permanent base upon which it rests. The reasons for the French law upon this subject are stated by the same author in the same work, p. 517, § 129, where the rule is laid down with regard to such ornaments as mirrors, pictures and statues, that the law will presume the proprietor intended them as immovable when they cannot be taken away without fracture or deterioration, or leaving a gap or vacancy. A statue is regarded as integral with the permanent base on which it rests, and which was erected expressly for it, when the removal of the statue will offend the eye by presenting before it a distasteful gap, a foundation and base no longer appropriate or useful (Id. § 139). Things immovable by destination are said to be those objects movable in their nature which, without being actually held to the ground, are destined to remain there perpetually attached for use, improvement or ornament (2 Ledru Rollin, Repertoire Generale, 514, § 30).

¹ *Snedeker v. Warring*, 12 N. Y. 170, Johnson, J., dissenting.

* In *Voorhis v. Freeman*, 2 W. & Serg. 116, it was held that rolls which formed part of the machinery of a mill were to be regarded as fixtures, although detached at the time the question arose, and kept on hand for the purpose of re-

§ 416. The strict rule of the ancient law has been much relaxed in favor of trade, and to encourage industry. As between landlord and tenant, the latter may take away, during the term, chimney pieces, wainscot, machinery and implements, such as brewing vessels, coppers, engines, cider mills, &c., which he has erected, and by which he not only enjoys the profits of the estate, but carries on a species of trade. So likewise, trees, plants and shrubs, in a nursery, are personal chattels as between the landlord and tenant and his assigns, for the taking and removal of which an action of trespass will lie.¹ * But the tenant must remove the trees at

placing others that were actually in use, and in *Pyle v. Pennock*, 2 W. & Serg. 391, that plates of iron which had been placed on the floor of a rolling mill to protect it against fire were a part of the building, although not fastened to it in any way, and kept in place by their own weight. In the case of a factory, the wheel or engine which furnishes the motive power, and all that part of the gearing and machinery which has special relation to the building with which it is connected, belong to the freehold, while an independent machine like a loom, which if removed still remains a loom, and can be used as such whenever it is wanted and power can be applied to it, will still retain its character of personality (*Murdock v. Gifford*, 18 N. Y. R. 28, per Johnson, C. J., citing *Powell v. Monson* Co. 3 Mason, 459; *Gale v. Ward*, 14 Mass. 352; *Cresson v. Stout*, 17 Johns. 116; *Swift v. Thompson*, 9 Conn. 63; *Teaff v. Hewitt*, 1 McCook, 511; *Vanderpoel v. Van Allen*, 10 Barb. 157). Where machinery is severed from a mill, the owner is not thereby divested of his property, but what was before part of his freehold becomes by the severance personal property and may be reclaimed (*Morgan v. Varick*, 8 Wend. 587). In *Farrant v. Thompson*, 5 Barn. & Ald. 826, it was held that mill machinery, when severed from the mill, became the personal property of the owner of the mill, and though it was sold as the personal property of the tenant to whom the mill had been demised, that no property passed to the purchaser, but that the landlord might bring trover. But according to *Gordon v. Harper*, 7 Taunt. 9, and several other cases, if the machinery in that case had been demised to the tenant as personal property the action could not have been maintained until the termination of the lease. The owner of land granted to another a certain water privilege for the purpose of sawing and manufacturing marble in a mill contemplated to be built on the premises, and "also the right of procuring marble from the grantor's land free and unmolested, but not to the exclusion of other grantees." Held that the grantor had no right to the small pieces of marble necessarily broken off by the grantee in blasting and in reducing the blocks to a shape suitable for sawing (*Rice v. Ferris*, 2 Vt. 62).

¹ *Miller v. Baker*, 1 Metc. 27.

* In *Lee v. Risdon*, 7 Taunt. 191, Gibbs, Ch. J., in discussing the general question of fixtures, says that trees in a nursery are a part of the freehold until severed. In *Miller v. Baker*, *supra*, Dewey, J., remarks that, while this is no doubt true as between the heir and executor, and would be so also where the entire property in the land and in the trees growing thereon, is united in the same person, yet that where the owner of the trees has no permanent interest in the soil, but is using it for the mere purpose of nourishing and sustaining his trees until the proper time shall arrive for their removal, the interest in the trees may be considered as separated from the realty.

Wine plants growing upon a farm are personal property as between the tenant

the expiration of the lease, or the right to them will vest in the landlord.¹*

§ 417. There has been little, if any, deviation from the old rule as between the heir and executor, the mortgagee and mortgagor, and the grantee and grantor.²† *Wadleigh v.*

of the farm and his landlord. The tenant has the right to remove them from the farm, and his mortgagee of them, acquires the same right (*Wintermute v. Light*, 46 Barb. 278).

Where property tortiously severed from the freehold remains some time upon the premises, and is afterwards removed, the statute of limitations runs from the date of removal, and not from the time of the severance (*Morgan v. Varick*, 8 Wend. 587).

¹ 2 Kent's Com. 343; *Poole's Case*, 1 Salk. 368; 6 Bing. 437; *Cresson v. Stout*, 17 Johns. 116; *Holmes v. Tremper*, 20 Ib. 29; *Stockwell v. Marks*, 5 Shepl. 455; *Gaffield v. Hapgood*, 17 Pick. 192; *White v. Arndt*, 1 Whart. 91; *Union Bank v. Emerson*, 15 Mass. 159; *Lee v. Risdon*, 7 Taunt. 188; *Lyde v. Russell*, 1 B. & A. 394; *Beckwith v. Boyce*, 9 Mo. 560; *Whiting v. Brastow*, 4 Pick. 310; *Van Ness v. Pacard*, 2 Peters, 137; *Brooks v. Galster*, 51 Barb. 196.

² Litt. 53, *a*; *Day v. Bisbitch*, Cro. Eliz. 374; *Cave v. Cave*, 2 Vern. 508; *Culling v. Tuffnal*, Bul. N. P. 34; *Poole's Case*, 1 Salk. 368; *ex parte Quincy*, 1 Atk. 477; *Dudley v. Ward*, Amb. 113; *Lawton v. Salmon*, in note to *Lawton v. Lawton*, 3 Atk. 13, and in note to *Fitzherbert v. Shaw*, 1 H. Bl. 259; *Elwes v. Maw*, 3 East. 38; *Penton v. Robert*, 2 East, 88; *Day v. Perkins*, 2 Sandf. Ch. R. 359; *Kirwan v. Latour*, 1 Har. & J. 289; *Miller v. Plumb*, 6 Cowen, 665; *Connor v. Coffin*, 2 Fost. 538.

* The rule as to the right of a tenant to remove fixtures, has been stated to be, that things annexed to the freehold, if movable at all, must be moved before the expiration of the tenancy. The rule is founded on the supposed abandonment of the fixtures when left on the premises; or that they become a gift in law, to him in reversion, and are not removable (*Beardsley v. Sherman*, 1 Daly, 325; *Poole's Case*, 1 Salk. 368; *Lyde v. Russell*, 1 Barn. & Ald. 394; *Marshall v. Lloyd*, 2 Mees. & Wels. 450; *ex parte Quincy*, 1 Atk. 477; *Lee v. Risdon*, 7 Taunt. 188; *Colgrave v. Dias Santos*, 2 Barn. & Cress. 76; *Reynolds v. Shuler*, 5 Cow. 323; *Penton v. Robert*, 2 East, 88).

In *Preston v. Briggs*, 16 Vt. 124, it was held that the right might be exercised during the term, or *within a reasonable time afterward*. Articles affixed to the land for the improvement of the freehold—as for the purposes of agriculture—cannot be removed by the tenant even during his term (*Elwes v. Maw*, 3 East, 38).

† Where in an action for entering the plaintiff's premises and removing therefrom twenty-three iron kettles used for making salt, it appeared that the kettles, which were imbedded in brick arches, were bought of the defendant and mortgaged back to him to secure the purchase money, and that the money not having been paid, the defendant entered upon the premises and carried away the kettles by virtue of the mortgage. It was proved that the kettles which were set in the arches after the filing of the mortgage, could only be removed by tearing off a portion of the upper bricks of the arch and prying the kettles, out by a plank and bars; that it was the general custom to take the kettles, out and reset them every season, and that they had been taken out and reset before the defendant took them. It was held that the kettles were personally as against a subsequent purchaser of the salt works, who had no notice of the mortgage other than from the fact of its being on file in the clerk's office of the court (*Ford v. Cobb*, 20 N. Y. 344).

In Connecticut, the following have been held a part of the realty: a windlass

Jauvrin,¹ was an action of trespass brought by the vendee against the vendor of a farm, for carrying away from the premises, after the sale, a cider mill and press, stanchion timbers, hinge staples, tie chains, and tie-up planks. When the plaintiff purchased the farm, a barn thereon was being repaired; and for that purpose, the floors of the tie-ups, with the stanchions and stanchion timbers, and the chains had been removed, and only partially replaced at the time of the conveyance. The doors and windows and hinge hooks, by which they had been supported, had also been removed. The defendant contended that the articles in question were personal property, and did not pass to the plaintiff by the conveyance of the farm and buildings. A verdict, however, having been found for the plaintiff in the court below, the Supreme Court refused to disturb it.* The later authorities hold that as to fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee.²

§ 418. The manure of animals spread about the barn yard, or lying in piles at the stable window, passes by a deed of the real estate to the grantee.³† Where the defendant occupied the farm as tenant, the year preceding the removal of the manure, and the manure was made from the crops raised upon the farm, which the rules of good husbandry required should be used and expended upon and about the farm, it was held that in the absence of any agree-

in a slaughter house (*Capen v. Peckham*, 35 Conn. 88); a bell hung in the tower of a factory (*Alvord Carriage Manf. Co. v. Gleason*, 36 Conn. 86); a portable hot air furnace set in a pit prepared for it in the bottom of the cellar of a dwelling-house, held in its place simply by its own weight, together with the smoke-pipe belonging to it (*Stockwell v. Campbell*, 39 Conn. 362).

¹ 41 N. Hamp. 503.

² *Snedeker v. Warring*, 12 N. Y. 170.

³ *Parsons v. Camp*, 11 Conn. 525.

* Where A. quitclaimed land to W., on which a crop of wheat was growing, reserving the wheat by parol both at the time of the execution of the quitclaim and in a previous conversation, when it was agreed by the parties that it should be reserved; it was held that evidence of such reservation was not admissible to contradict the conveyance in writing which passed the title of the wheat with the land (*Austin v. Sawyer*, 9 Cowen, 39).

† So with fences and materials for a fence, though not actually in use for that purpose at the time of the conveyance (*Wadleigh v. Jauvrin*, *supra*, and cases cited).

ment authorizing it, he would not have a right to remove the manure from the farm. Even upon the supposition that as between the defendant and the grantor of the plaintiff, the defendant had the right to remove the manure, yet, in the absence of any notice, either actual or constructive, to the plaintiff of this right, the defendant's intention to remove it could not affect the plaintiff's right to the manure, unless that intention was manifested by some act sufficient to put the plaintiff upon inquiry at the time of his purchase.¹ In *Stone v. Proctor*,² Proctor sold his farm to Stone, March 22d, but was to retain possession until the 1st of April following. On the 28th and 29th of March, he drew from the premises the manure as it originally lay in the barn yard, and in heaps at the stable windows. The plaintiff proved his deed, which was in the usual form, and showed the removal of the manure by the defendant; and it was held that he was entitled to judgment. *Conner v. Coffin*,³ was an action of trespass for breaking and entering the plaintiff's close, and carrying away manure. It appeared that one Ham sold the premises to the plaintiff at auction, and that at the time of the sale, no reservation was made of the manure; but that after the farm was sold, he directed the auctioneer to set up the manure, to which the plaintiff objected, claiming it as a part of his purchase, and forbidding the sale. No sale of the manure took place on that day; and on the next day, Ham, with a full knowledge of the plaintiff's claim, gave him a deed of the farm, without any reservation contained therein. On the morning before the sale took place, however, the plaintiff called upon Ham, and examined the premises, and was told by him that he should sell the farm in lots, and put up the manure separately. The manure was under cover in a place made for it behind the cattle stall in the barn. On the trial, two questions arose: 1st. Whether the manure passed by the conveyance, assuming that there was no reser-

¹ *Wetherbee v. Ellison*, 19 Vt. 379.

² 2 D. Chipman, 108; and see *Kittredge v. Woods*, 3 N. Hamp. 503.

³ 2 Fost. 538.

vation in the sale; and second, whether the evidence was competent to show a reservation. The jury having found for the plaintiff, the Supreme Court directed judgment to be entered on the verdict.

§ 419. Manure made on a farm occupied by a tenant in the ordinary course of husbandry, consisting of collections from the stable and barn yard, or of compost formed by an admixture of those with soil or other substances, is by usage, practice and the general understanding, so attached to and connected with the realty, that in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove it, or sell it to be removed; and such removal is a tort for which the landlord may have redress; and such sale will vest no property in the vendee. The foregoing rule does not apply to manure in a livery stable or in any manner not connected with agriculture. A farm tenant has a qualified property in manure to be used on the farm. But if he sells it, he thereby relinquishes his possession, and it vests in the owner of the freehold, who may maintain trespass *de bonis asportatis* against the vendee for removing it.¹ * Straw raised on a farm which is cultivated on shares, is not considered in law as manure. It is a part of the crop, and belongs to the owner of the crop, unless there is some stipulation to the contrary.²

§ 420. Although the general principle of law is, that a building permanently fixed in the freehold becomes a part of

¹ Daniels v. Pond, 21 Pick. 367; Lassell v. Reed, 6 Greenlf. 222; Kittredge v. Woods, 3 N. Hamp. 503; Lewis v. Lyman, 22 Pick. 437; Conner v. Coffin, 22 N. Hamp. 541; Plumer v. Plumer, 30 Ib. 558; Perry v. Carr, 44 Ib. 118; Middlebrook v. Corwin, 15 Wend. 169; Goodrich v. Jones, 2 Hill, 142.

² Forbes v. Shattuck, 22 Barb. 568.

* In Conner v. Coffin, *supra*, it was stated by Eastman, J., that he had found no case where the tenant of a farm had been permitted to remove the manure which had accumulated in the course of his term. It seems however to have been held in North Carolina, that a tenant, in removing, may lawfully take with him, where there is no covenant or custom to the contrary, all the manure made on the farm during his term. But he has no right to it, if he leaves it when he quits the farm. Taking away portions of the earth that are unavoidably mixed with the manure in raking it into heaps, will not make the tenant a *tort-feasor* (Smithwich v. Ellison, 2 Iredell, 326).

it,—that *prima facie* a house is real estate belonging to the owner of the land on which it stands,—yet it may be personal estate; and is so regarded where it was erected by the builder with his own money, and for his own exclusive use, as disconnected from the use of the land, and with the understanding between the owner of the land and the builder that it may be removed.¹* The general rule, that a building erected on land is regarded as real estate, has also been relaxed in favor of tenants.² However the rights of landlords against their tenants may have been considered in ancient times, it is now settled that, in favor of trade, manufactures and business, a building erected for those objects may be removed by him whose estate is determined. In

¹ Doty v. Gorham, 5 Pick. 487; Marcy v. Darling, 8 Ib. 283; Ashmun v. Williams, Ib. 402; Curry v. Com. Ins. Co. 10 Ib. 540; Wells v. Banister, 4 Mass. 514; Taylor v. Townsend, 8 Ib. 411; Benedict v. Benedict, 5 Day, 464; Prince v. Case, 10 Conn. 379; Parker v. Redfield, Ib. 490; Baldwin v. Breed, 16 Ib. 60; Curtiss v. Hoyt, 19 Ib. 154; Ricker v. Kelly, 1 Greenl. 117; Yale v. Seely, 15 Vt. 221.

² Beers v. St. John, 16 Conn. 322.

* The above cited cases, decided in Massachusetts and Maine, hold that where one erects a building on the land of another, the building remains the property of him who placed it there, and is personal property in him. But in Connecticut, in Benedict v. Benedict, *supra*, the ancient common-law doctrine was adopted, that a fixed and permanent building erected upon another's land, even by his license, became his property; but if, in its nature and structure, it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery. And in Curtiss v. Hoyt, *supra*, Waite, J., in dissenting from that part of the opinion of the court relating to the question whether the building was real or personal property, said that he could not accede to the doctrine that if a man erects a dwelling-house in a fixed and permanent manner upon the land of another by his license, such dwelling-house becomes personal property, and may be transferred in the same manner as a cart or a wagon; and that, in his opinion, it could only be conveyed as real estate, although the owner of the building might have such an interest in it as would be protected by a court of equity, and, in some instances, be recognized in a court of law. Heermance v. Vernoy, 6 Johns. 5, was an action of trespass, brought by Vernoy in the court below against Heermance for entering upon his land, pulling down a bark mill belonging to the plaintiff, and taking therefrom and carrying away a millstone, the iron bands and bolts with which the same had been fastened in the mill, together with portions of the mill. The defendant offered to prove that the person who sold the premises in question to the plaintiff, verbally excepted from such sale the mill, and that he afterwards sold it to the defendant. The court were inclined to think that the mill and its appurtenances were not part of the freehold, but personal property. But as the entry upon the land of the plaintiff was a trespass, and the only two witnesses introduced by the defendant were incompetent, and the defendant had therefore shown no title to the property which he had taken away, the judgment for the plaintiff below was affirmed.

Lawton v. Salmon,¹ Lord Mansfield held that improvements made by the tenant during his term might be taken away by him, if he did not thereby prejudice the estate of his landlord.² In Penton v. Robart,³ where the question was as to the right of the tenant to take down and remove buildings erected by him on the demised premises, Lord Kenyon asks: "Shall it be said that the great gardeners and nurserymen in the neighborhood of London, who expend thousands of pounds in the erection of greenhouses and hot-houses, &c., are obliged to leave all these things on the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the reality." *

§ 421. Where a person builds a house upon another's land, with the verbal leave of the owner, who agrees that the house may be removed at any time upon notice from

¹ 1 H. Black. 259, note.

² And see Taylor v. Townsend, 8 Mass. 411.

³ 2 East, 88.

* The use, by a tenant for years, of a portion of the materials of an old shop on the premises in the construction of a new one, will not, in law, vest the title of the latter in the owner of the former if the new building is a different and distinct one from the old shop, and not the old one repaired or reconstructed. The title to the new shop would depend upon whether or not it was substantially and essentially the same shop as the old one. In determining this question, it would be important and proper for the jury to consider what proportion of the materials of one entered into the composition of the other, the character of those materials, the particular use that was made of them, and the place they occupied, and the purposes they answered in the newly erected building (*Beers v. St. John, supra*). An action of trespass *quare clausum fregit* cannot be maintained by a landlord against an under-tenant at will of a tenant for years, for taking down and carrying away a house erected by him on the demised premises during the lease. In *Tobey v. Webster*, 3 Johns. 468, the premises in question were rented by the plaintiff in November, 1802, to one Barber for two years. In July, 1803, Barber gave the defendant written permission to occupy the premises as long as the defendant should remain in his (Barber's) employ, and to erect a small addition to the house. In November, 1803, Barber assigned his lease to one Coffin, who, in February, 1804, reassigned it to the plaintiff. The lease gave permission to cut timber. The house was built by the defendant with materials cut on the premises, and was taken away by the defendant previous to the reassignment of the lease to the plaintiff. At the circuit, a verdict was taken for the plaintiff. The Supreme Court directed the verdict to be set aside, and a judgment of nonsuit to be entered.

him, and the house is attached to the freehold so as to be a fixture, a subsequent mortgagee, without notice of such license, will, after he has taken possession of the land under a decree of foreclosure, be entitled to the house, and may maintain trespass against the person erecting it, if he then remove it. And if, after foreclosure, but before possession under the decree, one buys out the mortgagee, the purchaser will have the same right to the building that the mortgagee had, although he knew that the house was built with the understanding that it might be removed.¹

¹ Powers v. Dennison, 30 Vt. 752.

CHAPTER II.

WRONGFUL TAKING OF PERSONAL PROPERTY BY PRIVATE PERSON.

1. What constitutes.
2. Creditor obtaining possession of goods by unlawful means.
3. Party directing illegal seizure or sale by officer.
4. Right of owner of goods to retake them.
5. Return of property by wrong-doer.

1. *What constitutes.*

§ 422. Where a person meddles with the goods and chattels of another, either by laying hold of, removing, or carrying them away, he thereby becomes a trespasser, unless the act can be justified ;¹ and he incurs liability, though he take the property but for an instant.² * In order to constitute

¹ Webb v. Paternoster, Godb. 282, Pl. 401; Farmer v. Hunt, Brownl. 220.

² Price v. Helyar, 4 Bing. 597.

* When a person takes possession of, and appropriates the property of another without right, and against his consent, trespass *de bonis asportatis* will lie; and trover and replevin in the *cepit* are also, in general, concurrent remedies (Connah v. Hale, 23 Wend. 462; Pangburn v. Partridge, 7 Johns. 140; Thompson v. Button, 14 Ib. 84; Mills v. Martin, 19 Ib. 7; Clark v. Skinner, 20 Ib. 465; Rogers v. Arnold, 12 Wend. 30; Barrett v. Warren, 3 Hill, 348; Pierce v. Van Dyke, 6 Ib. 613; Ely v. Ehle, 3 N. Y. 506; Erisman v. Waters, 26 Penn. St. R. 467; Parker v. Hall, 55 Maine, 362). It is a well established principle that if one man wrongfully and by force take from another man his property, or compel him to give security for money, or procure the estate of another to be wrongfully attached, as the property of a third person, trespass will lie (Bird v. Clark, 3 Day, 272). And a mere intent to sell, in violation of law, property which may be used for lawful purposes, will not deprive the owner of his remedy against persons illegally interfering with it (Dolan v. Buzzell, 41 Maine, 473).

A person acquires no property in wood and timber which float in the water over his land. But it has been held that he has the exclusive right to seize wood and timber floating in an eddy over his land, and to appropriate the same unless the owner, in a reasonable time, claims it (Rogers v. Judd, 5 Vt. 223).

In New Hampshire, the statute of Dec. 1805, in force before the Revised Statutes, in substance provided that if any lumber, put into any river or stream running thereinto, and by the water carried or lodged upon any improved land, and not taken away by the owner or his agent, before the first day of May, annually, the owner of the land might detain such lumber until the owner of the lumber paid all damage; and if the parties did not agree upon the damages, they were to be settled by the selectmen or three justices of the peace. If such lumber was not removed by the owner on or before the 1st of November, annually,

the offense, there need not have been an actual forcible dis-possession. Any unlawful interference with the property of another, or exercise of dominion over it, though by mere words, by which the owner is damnified, is sufficient;¹ as the merely making an inventory, and threatening to remove the property, which is prevented by another giving a receipt for it; or by the unlawful purchase of the goods of a third person on an execution sale;² or by an attachment, although there was no removal of the goods;³ or by the finder of a lost article, using or wasting it.⁴ * In an action of trespass for taking property under a void execution, it appeared that among the property sold was a stack of hay which was not removed by the purchaser; and the judge having instructed the jury to allow damages for its value as well as for the other property sold, it was held that there was no error in the direction thus given; the act of selling the hay without authority, being a trespass.⁵ Where the owner of a brig, after agreeing to take a passenger from Boston to San Francisco, ordered him to leave the vessel, put part of his luggage

the owner of such land might take and convert the same to his own use; provided that, when the owner had paid the damages and costs, he should have liberty to remove the same before the 1st of May following. For a construction of this statute see *Wilson v. Wentworth*, 5 Fost. 245, dissenting from the view taken in *Walker v. Sawyer*, 13 N. Hamp. 196.

¹ *Wintringham v. Lafoy*, 7 Cowen, 735; *Gibbs v. Chase*, 10 Mass. 125; *Phillips v. Hall*, 8 Wend. 610; *Miller v. Baker*, 1 Metc. 27.

² *Hardy v. Clendening*, 25 Ark. 436.

³ *Neff v. Thompson*, 8 Barb. 213.

⁴ *Isack v. Clarke*, 1 Roll. 126; *Oxley v. Watts*, 1 T. R. 12; *Attack v. Bramwell*, 32 L. J. Q. B. 146.

⁵ *Lewis v. Palmer*, 6 Wend. 367.

* Where a growing crop of corn, which the owner bought at sheriff's sale, is tortiously cut and thrown on the ground, the declaration must be for trespass on personal chattels (*Brittain v. McKay*, 1 Iredell, 265).

In North Carolina, forcible trespass on personal property has been defined the taking of it from the owner by force in his presence; intimidation not being a necessary ingredient (*State v. Pearman*, Phill. N. C. 371).

A person can only be deprived of his property by his own voluntary act, or by operation of law. The thief who steals an article, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser, is a continuing trespass.

If goods be taken lawfully, the person taking them will not become a trespasser *ab initio* by refusing to redeliver them when his authority to detain them is ended (*Gardner v. Campbell*, 15 Johns. 401).

An action on the custom against an inn-keeper or common carrier, for the loss of baggage, is founded in tort or misfeasance, and not on contract (*The People v. Willett*, 26 Barb. 78).

ashore, and carried the residue to California, without giving the passenger notice and reasonable opportunity to remove it, it was held that the contract was broken and terminated by the unlawful conduct of the defendant before the actual sailing of the vessel; that a new relation thereupon arose between the parties, and that the subsequent acts of the defendant constituted him a trespasser.¹ * Second. Cong. Soc. v. Howard² was an action of trespass for taking and carrying away a title deed. It appeared that the deed was intrusted to one Crafts for safe keeping, and that he gave it up to the defendant, who was the grantor, at the request of the latter, and because the grantee stated that he objected to the deed at the time it was executed. It was held that the plaintiff was entitled to judgment, but, that as his title to the land was not divested by the giving up of the deed, unless he released the land, he could recover nominal damages only. So, likewise, where a person delivered goods to another who had no right to them, though he claimed he had, and agreed to call on L. and make it satisfactory, and after obtaining possession, refused to see L., but appropriated the property to his own use, it was held that an action of trespass might be maintained against him by the person from whom he so obtained the property.³ But where the defendant, claiming a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which the latter held of the defendant, and in which the plaintiff had put them, kept the key, and refused the plaintiff access to them, saying that nothing should be removed until the defendant's bill was paid, it was held not such a taking of the goods as would sustain an action of trespass.⁴ †

¹ Holmes v. Doane, 3 Gray, 328.

² 16 Pick. 206; and see Gibbs v. Chase, 10 Mass. 125.

³ Hurd v. West, 7 Cowen, 752. ⁴ Hartley v. Moxham, 3 Ad. & E. N. S. 701.

* In an action of trespass for untying the plaintiff's horse and removing him from a hitching post which the plaintiff had as good a right to use as the defendant, it was held that the plaintiff was entitled to recover (Bruch v. Carter, 3 Vroom, 554).

† In Stoughton v. Mott, 15 Vt. 162, which was an action of trespass for seiz-

§ 423. The offense may be committed without any wrongful intention. "Probably one half of the cases in which trespass *de bonis asportatis* is maintained arise from a misapprehension of legal rights."¹ In an action of trespass for carrying away the plaintiff's boards, it appeared that the defendant, having boards piled in a mill yard near to the plaintiff's boards, sent his hired man to get his boards, telling him to ask the sawyer to point them out, and that the man, acting under the instructions of the sawyer, drew away, by mistake, the boards of the plaintiff with those of the defendant. It was held that the plaintiff was entitled to recover, whether the fault was in the sawyer, or the hired man.²

§ 424. But, in order to maintain the action, it must be shown that the taking was without the permission of the plaintiff, either express or implied.* Where the plaintiff's witness testified that the plaintiff left in his possession a number of tanned calf skins; that the witness had no authority to sell the skins, nor did he do so; that the defendant came to the witness' house to examine them, saying that the plaintiff had authorized him to dispose of the same; that the defendant afterwards sold the skins, and they were

ing a sloop and certain arms and munitions of war, on board, under an act of Congress which authorized such seizure when there was reason to believe that the vessel was to be employed in a military expedition, the defendant's counsel requested the court below to instruct the jury that the act of boarding the sloop for the purpose of ascertaining the character of the loading was not a taking of the vessel for which an action of trespass would lie. To this the court assented, and charged the jury accordingly. It was, however, held on appeal, questionable whether the judge in so charging, did not go too far.

The plaintiff in an execution, cannot maintain an action against a third person for taking away property levied on, when it appears that there remained enough subject to the execution, and bound by the levy, to satisfy the execution, and that the plaintiff had either released the residue, or lost his lien upon it by his own want of due care (*Marsh v. White*, 3 Barb. 518).

A party who takes goods by trespass, cannot be charged as the trustee of the owner to whom the wrong is done (*Despatch Line of Packets v. Bellamy Manf. Co.* 12 N. Hamp. 205).

¹ Metcalf, J., in *Stanley v. Gaylord*, 1 Cush. 536.

² *May v. Bliss*, 22 Vt. 477; but see *post*, § 427.

* An action of trespass cannot be maintained against the clerk of a warehouseman for selling goods stored in the warehouse by the advice of his employer, but without the knowledge or consent of the owner (*Stafford v. Mercer*, 42 Geo. 556).

taken away from the witness' house; that the defendant brought the witness eight dollars as part of the proceeds of the sale of the skins, and requested him to give the same to the plaintiff, which he did, and the plaintiff received the money, and requested the witness to call upon the defendant for the balance. It was held that, as the evidence disproved any tortious taking, the action could not be maintained.¹ One of two partners made an assignment of the stock of the firm in the name of the firm, in trust for the benefit of the creditors of the firm. The other partner, who was a minor, executed a power of attorney to his copartner, authorizing him to execute the assignment on the minor's behalf. The property was judiciously disposed of by the assignee, and the proceeds distributed *pro rata* among the creditors, the assignee, who was a creditor, retaining only his proportional part of the proceeds. The minor, on coming of age, disaffirmed the assignment and power of attorney, and brought an action of trespass against the assignee for the alleged unlawful taking and removal of the property. But it was held that the action could not be maintained.²

§ 425. Where goods are taken by trespass from a trespasser, the owner may have an action of trespass against the last taker.* Were it otherwise, and a tortious taking changed the property of the goods, the trespasser could pass a good title to a third person, and the owner would have no remedy except against the original wrong-doer.³ But if there be no fault on the part of the second taker, he cannot be treated as a trespasser. It is a general rule that trespass

¹ Wellington v. Drew, 16 Maine, 51.

² Furlong v. Bartlett, 21 Pick. 401.

³ Barrett v. Warren, 3 Hill, 348.

* Where an officer wrongfully attached a horse, and while it was in his custody, wrongfully attached it again on a writ in favor of another creditor, it was held that the owner of the horse might maintain trespass against the officer and the second attaching creditor jointly (Cox v. Hall, 18 Vt. 191). Williams, Ch. J.: "If the first taking was wrongful, the plaintiff was still, in contemplation of law, the possessor, and could maintain an action against a subsequent wrong-doer; and the charge was a reiteration of the doctrine that if a second trespasser take goods out of the possession of the first trespasser, the owner may maintain trespass against such second trespasser, his act not being excusable."

will not lie against one who came to the possession of the goods by delivery, and without any fault on his part, although the person who made the delivery had no title, and was a wrong-doer.¹ As if A. take the horse of another, and sell it to B., trespass does not lie against B.²

§ 426. As a general rule, a bailee of goods cannot set up against his bailor that a third person has a better title to them. But if the goods are taken from the bailee by authority of law, exercised through regular and valid proceedings, it will be a defense to an action by the bailor. The bailee must assure himself, and show the court that the proceedings are regular and valid. But he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact.³ * Although a wharfinger is the agent of the person of whom he receives goods, and cannot dispute the title of his principal in an action brought by the principal against him, yet this will not protect the goods from an execution against the person thus depositing them; and if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can defend himself in a suit brought against him by the owner. If the person from whom the wharfinger or warehouseman

¹ *Marshall v. Davis*, 1 Wend. 109; *Nash v. Mosher*, 19 Ib. 431; *Wilson v. Barker*, 4 Barn. & Adol. 614; *Bac. Abr. Trespass, E*, 2.

² *Com. Dig. Trespass, D*, 396.

³ *Bliven v. Hudson River R. R. Co.* 35 Barb. 188.

* The bailment of property with a power of sale being a personal trust, the bailee has no authority to delegate this trust to another. *Hunt v. Douglass*, 22 Vt. 128, was an action of trespass against a deputy sheriff for attaching and selling a horse. It appeared that the plaintiff was the owner of a certain horse, which he put into the possession of his brother, to be used and sold or exchanged by him, and that the bailee exchanged the horse with one Lee for another horse, Lee agreeing to pay fifteen dollars as the difference, and that the horse which Lee received should remain the property of the plaintiff until the fifteen dollars were paid. It appeared further that, at the time of this transaction between the bailee and Lee, that the former told the latter that he might trade away the horse if he would keep the security good, and that Lee had traded three times, and that the horse now in question was the one which was obtained upon the third exchange. The fifteen dollars were not paid. The county court having, upon the foregoing facts, given judgment for the defendant, it was affirmed by the Supreme Court.

receives the goods claims them by a void title, so that he cannot lawfully hold them, and they are taken by authority of law out of the custody and care of the wharfinger, the latter may show this in excuse for not delivering them.¹

§ 427. If a servant takes property by mistake, without any direction or authority given him by his master to take the particular property in question, and there is no subsequent assent or approbation, with a knowledge of the trespass, on the part of the master, an action of trespass will not lie against the master for the taking; and his admission of the fact that the servant had taken the property, and offer of payment therefor, will not be construed into an assent to, or approbation of, the wrongful taking.² Where a heifer got into the possession of drovers by the act of their servant, without their knowledge or assent, and continued in their drove without their knowing that it was among their cattle, it was held that they were not liable in trespass therefor, unless they failed to exercise usual and proper precautions.^{3*}

¹ *Burton v. Wilkinson*, 18 Vt. 186.

² *Broughton v. Whallon*, 8 Wend. 474; and see *Miller v. Baker*, 1 Metc. 27; but see *ante*, § 423.

³ *Brooks v. Olmstead*, 17 Penn. St. R. 24.

* Where a sheriff places goods in charge of a receptor, and the receptor delivers them to a third person, whose servant removes and leaves them at a distance, an action of trespass may be maintained against the servant, although he was ignorant, at the time of the removal of the goods, of the sheriff's interest in them (*Sinclair v. Tarbox*, 2 N. Hamp. 135). This was an action of trespass for taking and carrying away a sleigh and harness. It appeared that the plaintiff, being a deputy sheriff, attached the property, and delivered it, on receipt, for safe keeping, to one A.; that shortly after, A., having occasion to go away, requested his brother B. to take care of the property until wanted; that thereupon B. absconded to the State of New York; and that the defendant, who was in his employ, drove thither and left the property there, but was ignorant, at the time, of the plaintiff's interest in it. A verdict having been rendered for the value of the property, subject to further consideration, the court said: "On the facts of this case, trover is the more usual remedy, and would certainly have been safer. But trespass also will lie if a tort has been committed; and the plaintiff, having an interest in the sleigh, had also an actual, or the right to an actual, possession of it. In respect to the bailment, it may be conceded, for the purpose of this argument, to be well settled, that, between parties to it, trespass will not lie for a mere non-delivery of the property bailed. But the defendant was no party to the original bailment, neither was his employer. And if he had been a party to it, the use and removal of the sleigh to New York were acts so foreign to the nature and design of the bailment as to prevent all protection under it, and to subject the person who thus removed and left the sleigh, to an action of trespass. This may not be on the ground that a bailee, in such case,

§ 428. Where a party has a license to take or hold goods, he will be liable as a trespasser if he meddle with the goods after the revocation of the license. A mere license for the purchase of lumber which is to be taken and measured from a larger bulk, and to be an average lot as to thickness and quality, may be revoked; and if the purchaser take it after such revocation, trespass will lie against him therefor.¹ In an action of trespass, for wrongfully attaching the property of the plaintiff, it appeared that some time after the attachment an agreement was made between the plaintiff and defendant, that the plaintiff should take the property, and if the suit was not settled in a short time he should return it to the defendant, who might then sell it. The property was accordingly delivered to the plaintiff, and afterwards returned to the defendant and sold, the plaintiff being present at the sale and forbidding it. It was held, that the plaintiff had a right to revoke the license to sell, and that the defendant, by selling, became a trespasser.^{2*}

2. *Creditor obtaining possession of goods by unlawful means.*

§ 429. As a valid act cannot be accomplished by unlawful

becomes a trespasser *ab initio*; but that a destruction of the article bailed, or a conversion to purposes altogether different from those intended, is without the scope of the contract of bailment, and may be prosecuted in the same way as if no bailment existed. Thus it is, that such acts of a bailee, if accompanied by other circumstances indicating a felonious intent, amount to larceny; and every larceny must involve a trespass."³

¹ Ockington v. Richey, 41 N. Hamp. 275.

² Wallis v. Truesdell, 6 Pick. 455.

* In this case, the court said: "It has been objected that the license was irrevocable, because it was founded on a sufficient consideration, and ought therefore to be considered as a valid contract. But we do not view it in that light. There was no sufficient consideration to support a contract. The agreement between Truesdell and the plaintiff was of no benefit to the plaintiff, nor was it any damage to Truesdell. He had no legal right to the property attached, nor had he any control over it. And if the agreement had been made between the plaintiff and the officer, still it would be *nudum pactum*; for it was the officer's duty to accept a good receipt for the property; and if not, he has not been injured thereby, nor has the plaintiff received any benefit. We think, therefore, the license was revocable; and having been revoked before the sale, the sale was unauthorized; and thereby the defendants became trespassers *ab initio*."

It is no defense to an action of trespass for carrying away personal property from the plaintiff's house, that it was done with the approval, and at the request, of the plaintiff's wife, then living apart from her husband, although some of the property belonged to her before marriage (Schindel v. Schindel, 12 Md. 108).

means, whenever such unlawful means are resorted to, all persons actively participating therein will be deemed trespassers, and the law will interpose to restore the party injured to his rights.* Where therefore a creditor procured the bringing of his debtor's goods into Massachusetts by fraudulent representations, for the purpose of attaching them there, the same being previously in New York, where they were not liable to attachment, it was held that both the creditor and officer were trespassers, although the latter acted under a lawful precept, and although the officer before he took the property had no knowledge of the fraudulent acts of the creditor.¹ In *Parsons v. Dickinson*,² unlawful means had been employed to keep the property of the debtor from passing to the vendee, and to continue its liability to attachment until the next day, and an attachment was thereupon made; but it was held that an attachment under such circumstances was ineffectual, and the parties making it were trespassers. In *Ilseley v. Nichols*,³ the attachment had been preceded by an unlawful breaking open of a dwelling-house, and it was held that as such unlawful means had been used to expose the property to the officer holding the writ, the attachment was invalid.†

¹ *Deyo v. Jennison*, 10 Allen, 410.

² 11 Pick. 352.

³ 12 Pick. 269.

* A sailor who had lodged several weeks at a public house, and also received advances of cash from the person who kept it, having been paid his wages in the presence of the father of the publican, went to the house of the latter, and drinking became intoxicated and fell asleep. The father of the publican in his son's presence, desired a young woman, an acquaintance of the sailor, to take the money out of his pocket, which she did, and laid it on the table. It was 13*l.* 17*s.* 6*d.* The publican took it up, and said he would keep it until the man got sober. The father told her to say when the sailor awoke that his money was lost. The publican said, she had better be there in the morning when he settled with the sailor. When the latter awoke and asked for his money, the father said it was all right until the morning. After this, at the request of the sailor, a pound in silver was given to the young woman out of the money, and the next morning, on his applying for the remainder, he was offered 2*s.* and some copper as the balance after deducting what he owed the publican. It was held that an action of trespass would lie against the publican and his father jointly, and that the sailor was entitled to recover the whole amount taken from him without any other deduction than that of the pound afterward given to the woman (*Peddell v. Rutter*, 8 Car. & P. 337).

† The plaintiff in an attachment suit will be protected by the judgment, although the affidavit and bond submitted in the proceedings are defective.

3. *Party directing illegal seizure or sale by officer.*

§ 430. It follows from the rule to which we have heretofore adverted, as to the responsibility of a person who is instrumental in the commission of a trespass by another,¹ that one who directs or causes an officer to levy an execution upon the property of a third person, is liable therefor, although he does not otherwise participate in the wrongful act.² G. recovered judgment in an action of debt against D., and employed his attorney, to whom he had previously assigned the debt in repayment of advances, to sue out execution. The attorney, who lived at Cheltenham, caused a *fi. fa.* to be sued out, directed to the sheriff of Buckinghamshire, to levy on D.'s goods, and the attorney's London agent indorsed on the writ: "The defendant resides at Wolverton, and is an inn-keeper, levy," &c. D. was, at the time, residing with his mother-in-law at an inn, of which she was the proprietor, at Wolverton, and was assisting her in the management, but had no interest in the premises, or the goods upon them. The sheriff, in execution of the *fi. fa.*, seized goods of the mother-in-law at the inn. She brought trespass against the attorney, and obtained a verdict upon the issues joined on pleas of not guilty, and denial of her property in the house and goods. On motion to enter a verdict for the defendant, it was held that the verdict against the attorney, on the issue upon not guilty, was maintainable, the facts furnishing evidence that he had directed the sheriff to levy on the plaintiff's goods.³ *Judson v. Cook*,⁴ was an action for taking the goods of the plaintiff who was a sheriff, and who held them by virtue of a levy. The defendant, who was the

He cannot therefore be made liable as a trespasser to a stranger to the proceedings (*Billings v. Russell*, 23 Penn. St. R. 189).

¹ *Ante*, §§ 23, 24.

² *McGuinty v. Herrick*, 5 Wend. 240; *Percival v. Jones*, 2 Johns. Cas. 49; *Taylor v. Trask*, 7 Cowen, 249; *Glover v. Horton*, 7 Blackf. 295; *Woodbridge v. Conner*, 49 Maine, 353; *Stetson v. Goldsmith*, 30 Ala. 602; s. c. 31 Ib. 649; *Bruhl v. Parker*, 2 Brevard, 406; *McNeeley v. Hunton*, 30 Mo. 332; *Mitchell v. Dubose*, 1 Rep. Con. Ct. 360; *Wickliffe v. Saunders*, 6 Monr. 296; but see *Dameron v. Williams*, 7 Mo. 138, and *Kreger v. Osborn*, 7 Blackf. 74 *contra*.

³ *Rowles v. Senior*, 8 Q. B. 677.

⁴ 11 Barb. 642.

president of a bank, directed an attorney to sue a note belonging to the bank, and he, acting under the instructions of the defendant, caused the goods to be attached and sold by a constable on an execution issued on the judgment obtained in the attachment suit, notwithstanding the previous levy of the sheriff. It was proved that the defendant knew of the previous levy, and that although requested by an agent of the plaintiff to relinquish the levy on the bank execution, he declined to do so. The defendant was at the sale and bid off some of the property. At the trial at the circuit, the plaintiff was nonsuited. The Supreme Court, in granting a new trial, remarked, that taking the whole evidence together, it made out a strong case connecting the defendant with the conversion; and that the fact that he acted as the agent of the bank, did not in the least diminish his liability.*

§ 431. It has often been decided, that if process be issued without jurisdiction, the party who causes it to be issued is liable as a trespasser.¹† If issued by competent authority, and regular on its face, it may afford protection to the officer for his acts previously done under it; but none whatever to the party. As to the latter, it is as though the goods had been taken and detained without process.² In

¹ Vredenburgh v. Hendricks, 17 Barb. 179; Merritt v. Read, 5 Denio, 352; Vosburgh v. Welch, 11 Johns. 175; Miller v. Brinkerhoff, 4 Denio, 118; Sprague v. Birchard, 1 Wis. 457; Stone v. Chambers, 1 Strobb. 117.

² Lyon v. Yates, 52 Barb. 237; Kerr v. Mount, 28 N. Y. 659; Chapman v. Dyett, 11 Wend. 31; Smith v. Shaw, 12 Johns. 257; Hayden v. Shed, 11 Mass. 500; Codrington v. Lloyd, 8 Adol. & El. 449; Parsons v. Lloyd, 2 W. Black. 845.

* Where a landlord placed a warrant of distress for rent in the hands of an officer and directed him to serve it, and the officer made an illegal levy and sale, it was held that the landlord was liable to his tenant for damages caused by such levy and sale (Parkerson v. Wightman, 4 Strobb. 363).

† The reversal of the judgment on which the execution issued in an attachment suit does not invalidate the levy or sale, or make either the party or the officer a trespasser. It merely annuls the title acquired by means of the sale, and entitles the owner of the chattel to recover it from any one into whose possession it has come (Reinmiller v. Skidmore, 7 Lans. 161). When, however, an attachment, under cover of which goods are taken, is set aside for irregularity, it affords no protection for such taking to the creditor who procured it to be issued; but only to the officer (Wehle v. Butler, 43 How. Pr. R. 5; and see Lyon v. Yates, and Kerr agst. Mount, *supra*).

An action of trespass may be maintained against a deputy clerk who wrongfully issues an execution under which goods are sold (Coltraine v. McCain, 3 Dev. 308).

Perkins v. Proctor,¹ it was held that trespass would lie against the assignees under a commission of bankruptcy sued out against a person not liable to be declared a bankrupt. And where property of the defendant in an attachment suit was taken and sold, at the instance of the plaintiff, on a judgment rendered by a justice of the peace in favor of the plaintiff, no writ having been returned, and the defendant not having appeared, it was held that both the plaintiff and the justice were trespassers.² When, however, a person does no more than to prefer a complaint to a magistrate, he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction; though if the complaint is malicious, and without probable cause, the complainant may be answerable in another form of action.³ In *Barker v. Stetson*,⁴ the defendant made a complaint to a magistrate under the statute, and therein prayed him to issue process for the seizure of the plaintiff's liquors. The magistrate issued the process, and an officer served it according to its precept. The section of the statute under which the process was issued being unconstitutional, the magistrate had no jurisdiction; the process was void; and the service of it was a trespass upon the plaintiff, for which the magistrate and the officer were answerable. But it was held that the defendant was not liable as a trespasser. And the plaintiff would not be liable with the magistrate for the issuing of process without a sufficient oath—the magistrate being the proper person to pass upon its sufficiency.⁵

§ 432. A plaintiff is not liable for the irregular execution of his process, unless he commands or sanctions it.⁶ If he disavows the unlawful seizure, he will be held excused; and,

¹ 2 Wils. 382.

² *Selby v. Platts*, 3 Chand. Wis. 183.

³ *Brown v. Chapman*, 6 C. B. 365; *Carratt v. Morley*, 1 G. & D. 275; 1 Ad. & El. N. S. 18; *Cooper v. Harding*, 7 Ib. 928; *West v. Smallwood*, 3 M. & W. 418; *Barber v. Rollinson*, 1 Cr. & M. 330; *Chivers v. Savage*, 5 El. & Bl. 701; see *ante*, § 303.

⁴ 7 Gray, 53.

⁵ *Outlaw v. Davis*, 27 Ill. 467.

⁶ *West v. Shockley*, 4 Harring. 287; *Abbott v. Kimball*, 19 Vt. 551.

in the absence of proof, it will not be presumed that he directed it.¹ But it is otherwise when he permits the goods to be retained for his benefit;^{2*} or when he refuses to give up the property wrongfully levied upon, although not present when the property was taken.³ Where goods are wrongfully seized under an attachment against another person, and the owner of the goods files an interpleader which the plaintiff in the attachment defends, it will be deemed such a ratification, on the part of the latter, of the acts of the officer, as will render the plaintiff liable as a trespasser.⁴ As a general rule, in case of an irregular sale by an officer, where the mistake is one of fact, and such as makes the officer a trespasser, and the party, knowing all the circumstances, consents to take the avails of the sale; or where he counsels the very act which creates the liability of the officer, he is implicated to the same extent as the officer. When, however, the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser by relation, the party is not affected by it, even when he receives money which is the result of such irregularity, although he was aware of the course pursued

¹ 1 Chit. Pl. 7th Am. ed. 91, 92; *Averill v. Williams*, 1 Denio. 501.

² *Harrison v. Mitchell*, 13 La. An. 260; *Root v. Chandler*, 10 Wend. 110; *Prince v. Flynn*, 2 Litt. 240; *Smith v. Felt*, 50 Barb. 612; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Lewis v. Johns*, 34 Cal. 629; *Alfred v. Bray*, 41 Mo. 484.

³ *Cook v. Hopper*, 23 Mich. 511.

⁴ *Perrin v. Claflin*, 11 Mo. 13; *Woolen v. Wright*, 1 Hurl. & Colt. 554. *contra*.

* *Root v. Chandler*, *supra*, was an action of trespass, for taking two horses belonging to the plaintiff. It appeared that the horses having been seized under an execution against a third person, the creditors of such third person, of whom the defendant was one, had a consultation, and directed the officer to detain the horses, agreeing to indemnify him; and that the officer, after keeping them a few days, sold them. It was held, that although the defendant had no agency in the first taking of the property, yet, as the plaintiff remained in the constructive possession of it, notwithstanding the levy of the execution, the defendant was liable as a trespasser.

Where goods of a party are seized under a process which has issued in a suit in which such party is defendant, but the seizure takes place without the knowledge or authority, or in the name, of the plaintiff in such suit, the circumstances that the goods afterward came to his hands, and that he, knowing the facts connected with the seizure, refuses to give them up, do not make him a trespasser (*Wilson v. Tummon*, 13 L. J. N. S. 307).

by the officer. He is not liable unless he consents to the officer's course, or subsequently adopts it. He may always take money which the officer informs him he has legally collected, without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter; and the fact that the officer is compelled to refund to the debtor, on account of the irregularity of the procedure, will not affect the right of the creditor to retain the money.¹

§ 433. Where, after process has fulfilled its purpose, the officer continues to act under it by direction of the plaintiff, both the officer and plaintiff are trespassers.² In *Vail v. Lewis*,³ the gravamen of the first count of the declaration was, that the defendants maliciously caused and procured the sheriff of Westchester to execute the *test fi. fa.* in his hands after the payment of the judgment to the sheriff of New York, on the execution previously delivered to him. It was averred that the sheriff of Westchester made his levy on the 2d day of December, which was after the execution was returnable; and that he sold on the 10th of the same month. The court remarked that if the levy and sale did in fact take place on those days, the sheriff was wholly unauthorized; and if the defendants caused and procured the proceedings, nothing could be clearer than that they were all trespassers.*

¹ *Hyde v. Cooper*, 26 Vt. 552, Redfield, Ch. J.

² *Collins v. Waggoner*, Breese, 26.

³ 4 Johns. 450.

* In *Vail v. Lewis*, *supra*, the second and third counts of the declaration stated the issuing of two executions—one to the sheriff of New York, and one to the sheriff of Westchester. The ground of complaint was, that after payment of the judgment the defendants were bound to have countermanded the service of the execution delivered to the sheriff of Westchester, so as to have prevented the plaintiff's goods from being levied on and sold; and that the defendants, maliciously intending to injure the plaintiff, did not countermand, and that the sheriff of Westchester did afterwards sell the plaintiff's goods. Held, that as after the return of the execution its force was spent, and the defendants had therefore no reason to apprehend that the sheriff would proceed upon it, they were under no legal or moral obligation to countermand it.

The receipt by a person acting in an official capacity—*e. g.*, a county treasurer—of money collected by virtue of a process issued by him, after the return day, will not make him a trespasser, unless he had notice that the money was collected after the return day (*Van Rensselaer v. Kidd*, 6 N. Y. R. 331).

§ 434. In order to render the party jointly liable with the officer, it must appear that they both participated in the wrongful act.* A., having wrongfully sued out an attachment against B., directed the sheriff to levy it on one-half of a boat and cargo which B. and C. owned jointly. The sheriff took the whole boat and cargo, and forbade C. interfering with them, A.'s son being present at the time. It was held, in an action of trespass against the sheriff and A. jointly, that a joint verdict could not be rendered against them; A. not being liable for the sheriff's acts in seizing property upon which no levy was directed; and the sheriff not being liable for A.'s trespass in suing out the attachment, or directing a levy on B.'s property.¹ In *Stoughton v. Mott*,² which was an action of trespass for seizing a sloop, and certain arms and munitions of war on board of the same, under an act of Congress which authorized such seizure when there was reason to believe that the vessel was to be employed in a military expedition, the court was requested to charge that if the manner of boarding the vessel amounted to a taking, yet that the defendant was not responsible unless he united or participated in the order for such taking. The instruction was in substance, that if the defendant knew of the intention to take the sloop, and voluntarily assisted with his boat, he was, in contemplation of law, a party and principal in the trespass. The Supreme Court held, that in the last named particular, the charge was correct; it being such an invasion of the property of the plaintiff as would amount to a trespass, and for which, unless justified, the defendant was liable. Where there is but one taking of personal property by an officer upon separate writs of attachment, sued out by two creditors against the same debtor, the taking will be deemed the joint

¹ *Clay v. Sandefer*, 12 B. Mon. 334.

² 15 Vt. 162.

* A. and B., the defendants, went together to the house of the plaintiff's mother, and A. seized there a sum of money belonging to the plaintiff. There was some evidence of A. and B. having gone with the intent to get the money, but there was no evidence that B. went into the house. They subsequently paid the money into a bank to their joint account. It was held that the plaintiff might waive the trespass and maintain an action for money had and received against the two defendants (*Neate v. Harding*, 20 L. J. 250).

act of the creditors in an action of trespass brought against them and the officer for the taking; but either of the defendants would be at liberty to disprove any concern on his part in the transaction, or to show that the attachments were made at different times.¹ If a party turn out property to an officer, and direct him to take it, and an action is brought against him and the officer for taking the property, he cannot set up in justification, that he acted in aid or assistance, or by command of the officer. To entitle him to do so, there must have been either a request from the officer, or it must appear that aid or assistance was necessary, from which a request may be implied.²

§ 435. The act of an agent within the scope of his authority, in causing the wrongful seizure of personal property, will be deemed the act of his principal.³ A direction by the attorney to the sheriff to take the goods of a third person, under a writ of execution, is of this character, and will render the client liable in trespass therefor.⁴ * Where the

¹ *Ellis v. Howard*, 17 Vt. 330; *Wehle v. Butler*, 43 How. Pr. R. 5, referring to *Creed agst. Hartmann*, 29 N. Y. 591, aff'g s. c. 8 Bosw. 123; *Kasson agst. The People*, 44 Barb. 347.

² *Merrill v. Near*, 5 Wend. 237.

³ *Mills v. Dawson*, *Peake's Add. Cas.* 59; *ante*, § 49.

⁴ *Jarman v. Hooper*, 1 Dowl. & L. 769; 13 L. J. N. S. 63; 8 Jur. 127.

* The approbation by a superior of a trespass committed by his inferior, renders the superior a trespasser. In *Van Brunt v. Schenck*, 13 Johns. 414, the defendant was surveyor of the port of New York, and was sued for seizing a schooner called the *Nancy*. A witness for the defendant testified that he seized the *Nancy* for a breach of the embargo laws, and immediately reported the seizure to the defendant, who approved of what he had done. This, the Supreme Court said, was a complete ratification and adoption of the act of seizure, and put the defendant in the same situation as if he had himself made the seizure. The defendant had an interest in the seizure. Had the schooner been condemned, he would have been entitled to a part of the forfeiture. The defendant, while the schooner was under seizure, had used her to transport his goods from Hurl Gate to New York. In *Bishop v. Viscountess Montague*, Cro. Eliz. 824, the defendant's bailiff took five oxen as for heriots due to the defendant, when there was not any due, without any command from the defendant; but she agreed thereto, and converted the oxen to her own use. Two of the judges held that she was liable in trespass, but not in trover, and the other two judges held that she was liable in trespass or trover. In that case, a trespass was committed, and the property taken and delivered to the defendant. She accepted the property, and converted it to her own use—property which her bailiff had wrongfully taken for her; and she thus affirmed his act. But if a person, on hearing that a horse had been taken from a neighbor, should say "I am glad of it; I wish two

property of a third person is wrongfully sold under an execution, the sureties, in the bond of indemnity which is given to the sheriff to procure the sale, are liable as trespassers;¹ on the ground that, as the bond contemplates the sale, it is a virtual request to the sheriff to make it, and that what the officer does is in effect done under the direction, and with the advice and concurrence, of the sureties.² But the liability would not extend to the scrivener who drew the bond.* When a creditor executes a bond of indemnity to the officer after a wrongful levy, he is a joint trespasser with the officer as to all that is done with the property afterward.³ But it is otherwise of a third person who participates in the enjoyment of personal property wrongfully taken, but without exercising any control over it, or over the wrong-doer. In *Hubbard v. Hunt*,⁴ which was an action of trespass for taking a horse and wagon, it appeared that the horse and

horses had been taken instead of one," he would not thereby make himself a trespasser.

In Bacon's Abridgment—Trespass—G, 1—it is said: "If J. S. agree to a trespass which has been committed by J. N. for his benefit, this action lies against J. S., although it was not done in obedience to his command, or at his request." So, in Com. Dig. Trespass, c. 1, it is said "that trespass lies against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it." But "if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing the goods in seizure, though not privy to the misusage." In *Gibson's Case*, Lane, 90, two or three strangers, affirming that they were servants of Gibson, seized the plaintiff's goods; and it was held, that "if they, as servants to Gibson, without his precedent appointment, did seize the plaintiff's goods, and the said Gibson approved them to be seized, although his servants, without his consent, abuse the goods, yet Gibson shall be trespasser *ab initio*."

¹ *Wetzell v. Waters*, 18 Mo. 396; *Murray v. Ezell*, 3 Ala. 148.

² *Davis v. Newkirk*, 5 Denio, 92.

³ *Lovejoy v. Murray*, 3 Wallace, 1.

⁴ 41 Vt. 376.

* Upon the same principle which shields the attorney who simply conveys to the officer the instructions of his clients, where the party directing the seizure finds it convenient to empower his attorney to execute the instrument of indemnity in his name and behalf, as his agent, the attorney so executing it as agent will not be a party to the seizure, so as to make him a trespasser if it turn out to be unwarranted. The act of executing the bond as attorney would be harmless, provided he acted under sufficient authority from his principals. In *Ford agst. Williams*, 13 N. Y. R. 577, the question arose, whether the fact that the attorney used a seal when he had no right to do so, and when that circumstance did not impair the contract which he made (the contract being the precise one which he was authorized to make), so changed his relation to the seizure as to render him liable as a party aiding or abetting its commission; and it was held that it did not.

wagon were hired by one Quimby to go to Barton; that he invited the defendant to ride with him; and that he drove beyond Barton to Newport, where he left the team. At the trial of the cause in the court below, the court were requested by the plaintiff to instruct the jury that "if they found that Quimby hired the team to go to Barton, and no further, and so informed the defendant, that when the defendant went with Quimby in said team from Barton to Newport, he became equally a trespasser with Quimby." The court refused so to instruct, but charged that "though the defendant knew that Quimby hired the team to go to Barton, and no further, still if he merely rode from Barton by invitation of Quimby, and exercised no control over the team, he would not be liable;" and this instruction was sustained on appeal.*

* In *Hubbard v. Hunt*, *supra*, the Supreme Court, in sustaining the instruction, said: "The plaintiff's request goes upon the ground that the fact that the defendant merely rode with Quimby, with knowledge that Quimby hired the team to go to Barton, and no further, made the defendant a trespasser, even though he exercised no control over the team or Quimby. This proposition of the plaintiff cannot be sustained by the authority of any well considered case, nor upon principle. To constitute the defendant a trespasser, it was not necessary for the plaintiff to prove that the defendant had any knowledge or information as to the terms of the bailment of the team to Quimby. The question whether the defendant was liable depended upon his own acts in respect to the team, and not on his information as to whether Quimby had a right to go with the team from Barton to Newport. Suppose that Quimby had overtaken the defendant just after he left Barton for Newport, and invited him to ride, saying to him that he hired the team to go only to Barton, but had concluded to go on to Newport, and the defendant had accepted the invitation, riding with Quimby, but exercising no control over the team; it would be a very harsh rule to hold that riding with Quimby under such circumstances, either with or without knowledge that Quimby would, by going to Newport, exceed his authority as to the use of the team, constitute the defendant a trespasser. Again, suppose that Quimby had told the defendant that he (Quimby) hired the team to go to Barton, and from that place to Newport, and the defendant had, in going from Barton to Newport, exercised control over the team, he would be a trespasser, if the use of the team from Barton to Newport was not authorized by the owner, notwithstanding his ignorance of the fact that Quimby hired the team to go to Barton, and no further. The words in the charge, 'if the defendant merely rode from Barton, by invitation of said Quimby, and exercised no control over the team, he would not be liable,' cover the whole ground. They made the plaintiff's right of recovery depend on the finding of the jury, that the defendant did exercise control over the team; and from the charge the jury must have understood that if they found that the defendant, by his acts or declarations, either directly or through Quimby, in respect to the team, did exercise control over it, the plaintiff would be entitled to recover. The jury failing to find such fact, the defendant was entitled to their verdict."

§ 436. A mere-purchaser at a sheriff's sale, of personal property tortiously levied on, under an execution against another, is not responsible in trespass for the wrongful act of the sheriff; his purchase not in itself making him a participant in the wrongful seizure, or a trespasser by relation.¹ Where a part of a quantity of saw logs were wrongfully levied upon, and the logs afterward sold on the execution, without distinguishing which part, and the buyer neither took possession, nor assumed any dominion or control over the property, although he gave his note for the amount of the sale, which was not due when the action was brought, it was held that trespass would not lie against the officer and buyer.^{2*}

§ 437. A person who sues out a void process of attachment, and causes it to be levied upon the property of another, becomes liable for all of the injury that results therefrom.^{3†} In *Kerr v. Mount*,⁴ which was an action for the illegal seizure under an attachment of goods belonging to the plaintiff, counsel for the defendant contended that if the seizure were considered to be illegal, and an act of trespass on the part of the defendant, still the injury to the property, by the negligence of the sheriff's officer, was not chargeable to the defendant, but only to the sheriff; that the defendant, by pro-

¹ *Talmadge v. Scudder*, 38 Penn. St. R. 517; *Janes v. Martin*, 7 Vt. 92.

² *Conkey v. Amis*, 13 Ind. 260.

³ *Peak v. Lemon*, 1 Lansing, 295; *Lyon v. Yates*, 52 Barb. 237.

⁴ 28 N. Y. 659.

* When property is unlawfully sold under an execution, neither the official character of the vendor, nor the publicity of the sale, will legalize it. But sales of property authorized by law, will be upheld, notwithstanding irregularities in the proceedings. Public policy requires that the innocent purchaser should not suffer by the misconduct of an officer executing a legal precept within his authority and jurisdiction (*Wheelwright v. Depeyster*, 1 Johns. 471; *Carter v. Simpson*, 7 Ib. 535; *Saltus v. Everett*, 20 Wend. 267; *Com. v. Kennard*, 8 Pick. 133; *Cooper v. Chitty*, 1 Burr. 20; *Symonds v. Hall*, 37 Maine, 354).

† As the issuing of an attachment is a judicial proceeding, it has been held that trespass will not lie against a party for causing an attachment to be issued in a suit on a debt not payable until after the commencement of the action (*Ivy v. Barnhartt*, 10 Mo. 151). An action cannot be maintained for maliciously suing out an injunction until the final disposal of the injunction, or until the suit in which it was sued out is terminated (*Tatum v. Morris*, 19 Ala. 302).

curing the process and placing it in the hands of the officer, became responsible only for conduct on the part of the officer, which he would have had a right to pursue, if the process had been valid; that the defendant did not direct or countenance the culpable negligence and misconduct by which the property was injured, but only the seizure of it, and the keeping of it securely and carefully; that if he had only done this, the property would have been returned to the plaintiff in the same state it was in when seized, and the damages would have been nominal. It was held, however, that the officer in such case, being the agent or servant of the party in whose favor the process was issued, the party was clearly liable for any injury to the goods caused by the negligent or careless acts of the officer while such goods were in his possession.

§ 438. Where goods wrongfully levied upon, are sold in consequence of indemnity executed to the officer by a subsequent execution creditor, the latter will be liable in trespass for the full value, notwithstanding the proceeds of the sale went to satisfy the first execution.¹* If the party, after causing the wrongful seizure of goods, again causes the seizure of the same property upon process that is valid, and regular, it does not purge the original wrong, nor go in mitigation of damages. By procuring a sale on legal process, of property wrongfully taken, the wrong-doer cannot be better

¹ Weber v. Ferris, 2 Daly, 404; 37 How. 102.

* In Weber v. Ferris, *supra*, the court said: "The defendants as indemnitors and directors of the sheriff, are liable as original trespassers. There is nothing in the point that the goods had been previously levied upon under a prior execution. That was a mere formal and technical levy, which the officer would not have pressed without an indemnity. It was made in the ordinary routine of duty without instructions from the plaintiff in the execution. The seizure and sale of the goods, and their consequent loss to the plaintiff, resulted from the special instructions, and indemnity given upon their execution, by the present defendants. The application of the proceeds of the trespass was immaterial, and the fact that they went to satisfy the first execution, did not tend to mitigate the damages. The trespass consisted in the seizure of all the property, and the defendants, as directors and indemnitors, are liable for its full value. If they were unwilling to assume so great a responsibility, the particular part of the property upon which a levy was to be risked, should have been pointed out and separated."

off than he would have been if he had offered to restore the property to the owner. But no tender will, at common law, either bar an action for a tort, or take away the right to full compensation.¹

4. *Right of owner of goods to retake them.*

§ 439. It is a general rule that the owner of goods which have been wrongfully taken, may, so long as their identity can be established, lawfully repossess himself of them wherever they can be found;² and where timber was wrongfully put into the frame of a boat, it was held that the owner might take possession of it, without being liable as a trespasser.³ But the recaption must be made in a peaceable manner.⁴ If done with a breach of the peace, the party would be answerable criminally. The riot or force would not, however, subject the owner of the chattel to a restoration of it;⁵ nor to an action of trespass,⁶ unless the force was excessive.

§ 440. Where a purchaser of personal property obtains it from the owner by falsehood and fraud, he acquires no right to it, and the seller may pursue him and retake the property, using no more force than is necessary for that purpose; and if the purchaser resists the retaking, he becomes the aggressor; and the seller may employ such additional force as is required to regain the property.⁷ As between the owner and the person thus obtaining possession, or between the owner and the existing creditors of such

¹ *Otis v. Jones*, 21 Wend. 394; *Hanmer v. Wilsey*, 17 Ib. 91; *Higgins v. Whitney*, 24 Ib. 379; *post*, § 445.

² *Rogers v. Fales*, 5 Penn. St. R. 154; *ante*, § 167.

³ *Burris v. Johnson*, 1 J. J. Marsh. 196.

⁴ *Barnes v. Martin*, 15 Wis. 240; *Wilson v. Hooper*, 12 Vt. 655; *Beecher v. Parmele*, 9 Ib. 356; *Dustin v. Cowdry*, 23 Ib. 631; *Mussey v. Scott*, 32 Ib. 82; *Sampson v. Henry*, 11 Pick. 379; *Shipman v. Horton*, 17 Conn. 481; *Gregory v. Hill*, 8 Term R. 299; *Kunkle v. State*, 32 Ind. 220.

⁵ *Hyatt v. Wood*, 4 Johns. 150.

⁶ *Mills v. Wooters*, 59 Ill. 234.

⁷ *Hodgeden v. Hubbard*, 18 Vt. 504.

person, no property would pass out of the real owner, and he might reclaim it as against such person or his creditors.¹

§ 441. Where goods, which are exempt from levy and sale, are taken on execution, the owner may recover possession of them peaceably; and after he has done so, it will be trespass in the officer to retake them, and assault and battery, to retake them with force.² So where a public officer attaches the goods of one person, upon process against another, and the true owner afterward peaceably obtains possession of them, and the officer brings trespass for such taking, the defendant may show his right and defeat the action.³*

¹ *Buffington v. Gerrish*, 15 Mass. 156; *Badger v. Phinney*, *Ib.* 359.

² *Sims v. Reed*, 12 B. Mon. 51.

³ *Merritt v. Miller*, 13 Vt. 416.

* "To reject such a defense, and thus permit the plaintiff to recover the value of the property, when he is confessedly liable to refund that same money to the defendant, in an action brought by him against the plaintiff for the original taking, if the facts now offered to be shown should be established, would lead to unnecessary circuity of action. Such a course too, would involve the novel contradiction and absurd impropriety of deciding the same question of property in a civil action between the same parties in modes wholly irreconcilable, as either one or the other of the parties happened to be plaintiff or defendant" (*Merritt v. Miller*, *supra*, per Redfield, J.).

But one of two joint owners of personal property has no right to take it forcibly from an officer who has attached it on legal process against the other joint owner; and if he do so, the officer may maintain trespass against him therefor (*Whitney v. Ladd*, 10 Vt. 165). By the court: "If the joint owner may retake from the officer, he may resist the officer in taking at all. This would practically deny the power of attachment of the property on one owner's debt. To say that an attachment can be made, and the property still left or permitted to go back into the possession and control of a copartner, would enable him to sell each article to as many different purchasers as he could divide it into parts, and to sell the whole, in the entirety, such purchasers having no notice of the attachment, and thus put it utterly beyond the reach of the officer or attaching creditor, or the purchaser, under the officer's sale to follow it; and if it could be followed into third persons' hands, they would hold it as joint owners when they purchased the whole in good faith. It is impossible to hold that the interest of one joint owner of personal property can be taken and sold on his individual debt, consistently with our laws, without holding that the possession by the officer, is paramount to all others. The whole weight of the argument for the defendant is founded on this, that the attaching officer takes only the interest and possession of one joint owner; and, as at law, one joint owner may, at any time, take the possession from the other, it is therefore concluded he may take it from the officer; and it would necessarily follow, if the property were co-partnership effects in trade, he could continue to sell to customers, until all was sold. This is quite plausible; but in truth, the officer is not the keeper for the partner whose interest he takes. He is keeper for the law; and other interests are involved besides the owner's, with which the right of recapture is inconsistent, and therefore superseding that right. When a man conjoins his interest with another in the ownership of personal chattels, his right of possession is necessarily subject to this paramount right of the law."

§ 442. Upon a conditional sale of goods, the seller may, upon forfeiture of the condition, lawfully repossess himself of them. Where a cow was sold on condition that if the buyer should pay for her, she was to be his, otherwise to remain the property of the seller, and the buyer took the cow and kept her three or four years, and paid part of the price, but, upon being requested, neglected to pay the residue, and the son of the vendor, by his direction, drove the cow back, it was held that the son was not liable in trespass therefor.¹ *

¹ West v. Bolton, 4 Vt. 558.

* In this case the court said: "The plaintiff having failed to fulfil the conditions on the performance of which he was to have the property, all his claim at law was gone. Whether he had any equitable right is not here the matter in dispute. The owner might retake the property again, and divest the plaintiff of possession, and would not be guilty of any trespass in so doing. The performance of the condition was neither rescinded or waived, but insisted on; and it was in accordance with the contract that the owner proceeded to take the property, into his possession. As the plaintiff had not performed the condition precedent on the performance of which the property was to pass, the jury was rightly directed, that the facts, if believed, entitled the defendant to a verdict."

Earl sold, by conditional sale, an old wagon to McIntyre, reserving title to himself till McIntyre should pay for it. McIntyre took it into his possession and use, and made extensive repairs upon it. In its improved condition, it was sold or turned out by McIntyre to Child & Benton, at a specified price, to go in payment upon a subsisting indebtedness of McIntyre to them. Very soon after this transaction, McIntyre not having paid Earl for the wagon, Allen, a deputy sheriff, took the wagon by direction of Earl, upon a writ in his favor against McIntyre, and sold the same upon execution issued upon a judgment recovered by Earl, in pursuance of said attachment. At the time of the attachment McIntyre owed Earl not only for the wagon, but a considerable sum beside, as the balance of current accounts between them. An action of trespass having been brought by Child & Benton against Allen for taking the wagon, it was held that it could not be maintained. Barrett, J.: "Of course, the plaintiffs must, in the first instance, stand upon such title as would give them the right to retain and hold the wagon against the defendant, as the agent and servant of Earl. It is now too late to call in question the right of a vendor by conditional sale, to assert his title to the property. A purchaser from the conditional vendee acquires no right against the original owner by virtue of such purchase, and even may become a trespasser in the eye of the law by making such a purchase, and taking possession of the property under it. There is a reason in this case, if reason were necessary, why Earl resorted to an attachment. By virtue of the terms of the sale, his right to the wagon would have been satisfied by a tender of the amount of his lien, by an attaching creditor, and perhaps by an assignee. But until such tender, his possessory right continued perfect and absolute. As against the effect of such a tender, it may have been, and probably was, desirable to him to fasten upon the property for its entire value, not only in virtue of his lien for the original price of its purchase, but also as a means of turning it to account upon his debt against McIntyre, outside of the purchase money due for the wagon" (Child v. Allen, 33 Vt. 476).

§ 443. If a person intrusts goods to another to be returned in a given time, the owner, at the end of the time, may take them from one having a wrongful possession. Accordingly, where, by the terms of an agreement in writing between A. and B., A. left with B. a horse, to be kept six months, and if B. then paid twenty-five dollars, he was to have the horse one year longer, and if he paid twenty-five dollars more at the end of the year, the horse was to be the property of B., and B. sold the horse without having fulfilled the terms of the agreement, it was held that the act of sale terminated the bailment, and gave A. the right to take immediate possession, and to retain it until paid the balance of the purchase money.^{1*} And where it was agreed between A. and B. that a pair of cattle should be delivered to B., "to keep and use in a farmer-like manner for one year," B. to have the privilege of keeping them upon payment of a price named, and the cattle were accordingly delivered to B., it was held to be a bailment, and not a conditional sale; and the cattle having been sold by the bailee during the year, without having paid for them, it was held that the owner, after the year had expired, could follow and retake them, without being liable as a trespasser to the person from whom they were taken, though a purchaser for value.² So, on the other hand, if the owner of goods, after parting with them for a valuable consideration for a specified time, takes them back before the expiration of the time agreed, the rightful possessor may lawfully retake them. The plaintiff having a

¹ Dunham v. Lee, 24 Vt. 432.

² Chamberlain v. Smith, 44 Penn. St. R. 431.

* In Lee v. Atkinson, Cro. Jac. 236; s. c. Yelv. 172, where the owner of a horse let it for two days, and finding that the person who hired it was going another way than that for which he hired the horse, by force retook the horse within the two days, it was held that he was not justified, not because he might not retake his own, but because he had parted with the possession for those two days; thus recognizing the right of recapture, though not under such circumstances. So, too, if a distress is taken without cause, or contrary to law, before it is impounded, the party may rescue it (Co. Litt. 160; 3 Blk. Com. 12; Cotsworth v. Betison, 1 Ld. Raym. 104; s. c. 1 Salk. 247).

Where the bailee of goods agrees either to return the property bailed, or to deliver other property of the same kind and quality, the obligation on the part of the bailee rests in contract, and until delivery is made by him the bailor has no vested interest in the property (Hurd v. West, 7 Cowen, 752).

cow pasturing in the defendant's field, and being indebted for the agistment, agreed that the cow should be a security; that he would not remove her until the defendant was paid, and that, if he did, the defendant might take her wherever she might be, and keep her until he was paid. The plaintiff having removed the cow without paying the debt, and the defendant having seized her in the highway, in an action of trespass for the taking, it was held that the agreement might be set up as a defense under a plea that the cow was not the plaintiff's.¹ A. entered into an agreement with B., in consideration of four hundred dollars, to hire to him for a year certain slaves, and to oversee them, and work as a laborer for B. B. afterward, for good and sufficient cause, discharged A. from his service; and A. having taken the slaves away with him when he left, B. with another person pursued him, and took back the slaves; whereupon A. brought an action of trespass against B. and the other. It was held that, although the hiring of the slaves and of A. as an overseer was an entire contract, yet B.'s title to the slaves was not divested by the discharge of A. from his service, and that B. had a right peaceably to reclaim their possession.²

§ 444. If an infant rescinds a contract for the sale of personal property made by him, and the title is thus reinvested in him, an action of trespass cannot be maintained against him for taking the goods.³ But goods sold upon credit, cannot lawfully be seized by the seller upon the failure of the buyer to make payment. Where a vendor sold and delivered goods without payment, and then being apprehensive that he would never be paid, took them away from the debtor, and the latter brought an action therefor, it was held that the jury had no right to consider, in mitigation of damages, the fact that the goods had not been paid for, and that there was reasonable ground to believe that

¹ Richards v. Symons, 8 Q. B. 90.

² Leaird v. Davis, 17 Ala. 448.

³ Shipman v. Horton, 17 Conn. 481.

the vendee would never pay for them, as that would be tantamount to allowing a set-off of a debt in an action of trespass.¹

5. *Return of property by wrong-doer.*

§ 445. As previously stated,² a subsequent tender by the wrong-doer will not excuse him if I choose to demand the value. Where, therefore, the property of the plaintiff was illegally sold for a school district tax, bid off by the plaintiff's agent, and paid for with the plaintiff's money, it was held that the offer to deliver up the note of the agent, or to pay the same amount in money to the plaintiff, could not change the rule of damages.³ And a return of the property, though it be accepted by the owner, is not available in bar of the action, but only in mitigation of damages.⁴ * Where, however, goods are taken by virtue of an attachment illegally issued, it cannot be shown, even in mitigation of damages, that the property taken was afterward applied without the consent of the owner to the satisfaction of a valid execution against him.⁵ † But it has been held otherwise, where

¹ Gillard v. Brittan, 8 M. & W. 575.

² *Ante*, § 438.

³ Clark v. Hallock, 16 Wend. 607.

⁴ Tibbs v. Chase, 10 Mass. 125; Caldwell v. Arnold, 8 Minn. 265.

⁵ Pickering v. Trustee, 7 T. R. 53. And see Earle v. Holderness, 4 Bing. 462.

* The delivery and acceptance of a man's own property does not constitute a satisfaction. Where, therefore, in an action of trespass for an unlawful entry upon land, the defendant set up that after the entry there was an accord between him and the plaintiff, that the plaintiff should re-enter and enjoy the land without interruption by the defendant, and that the defendant should deliver to the plaintiff all the title deeds, which was done; it was held that this was no answer, as it must be presumed that the title deeds belonged to the plaintiff, and to deliver him his own deeds, and put him in possession of his own land, was no satisfaction of the previous wrong in keeping him out. It was, however, admitted, that if the defendant had shown any title in himself to the possession of the deeds, his delivering them up would have been a good bar to the action (Bro. Abr. Accord, 1).

† In Hanmer v. Wilsey, 17 Wend. 91, Wilsey brought an action of trespass against Hanmer for taking a horse under an attachment illegally issued by a justice of the peace. The officer who took the horse from the stable of Wilsey, by the direction of Hanmer, discovering the illegality of the proceeding, returned him to the stable, but Wilsey declined to receive the horse. Hanmer then caused an attachment to be legally issued, by virtue of which the horse was taken, and subsequently sold, under the judgment obtained in the attachment

the property is taken again from the trespasser without any agency or connivance on his part, and applied to the owner's use, although without the latter's consent, by the act of a third party.¹

§ 446. The fact that the owner of the goods has sold them subsequent to their being taken, will not purge the original wrong. Where drovers, having driven away a heifer, afterward bought it of the owner, reserving the question of damages for taking it away, it was held that such purchase would not bar an action of trespass for the removal. The wrong was not atoned for or satisfied, and the original action remained, as well by the understanding of the parties as by the operation of law.² A. loaded the materials of a building belonging to B. on to his wagon and drove off, B. threatening to prosecute him if he did not carry them back.

suit, and bought by Hanmer. The Supreme Court, in affirming the judgment of the Common Pleas, which was for the plaintiff, said: "There was no ground for mitigating the damages. The horse had been wrongfully taken, and the plaintiff had a right to insist on being paid the value. The actual return of the horse to the plaintiff's stable without his assent was a matter of no legal consequence. If the plaintiff had consented to receive the property, it would not have defeated his action altogether. It is not a defense which can be pleaded; it only goes to the question of damages. The plaintiff refused to receive the property, and insisted on his legal right to recover the value, as well as damages for the illegal taking. It can make no difference in principle that the horse was only kept a short time. The injury was complete, and the plaintiff's right of action was as perfect the moment after the horse was first led from his stable as it could have been after the lapse of a month or a year. The defendant could not, by any act of his own, without the plaintiff's consent, defeat the action. I was first inclined to the opinion that the second taking of the horse on valid process against the plaintiff, might be regarded as equivalent to an acceptance of the property when tendered, and that the damages should be mitigated on that ground. It may be doubted whether this question can properly be made on the bill of exceptions. But, waiving that consideration, the return and subsequent retaking of the property could not change the plaintiff's rights. They were complete, and he has done nothing to relinquish them. He said, in effect, to the defendant: You have wrongfully taken my property; I will not receive it back; do with it what you please, I insist on my remedy by action. There is, I think, no legal principle upon which the defendant, by any mere act of his own, could get rid of the difficulty. If the horse had not been returned to the plaintiff's stable, the levy of the second attachment could not have altered the case. It was a matter of no moment to the plaintiff what became of the horse after the original illegal taking. Replacing the animal in the plaintiff's stable, without his assent, was a nugatory act. It could no more operate to prejudice the plaintiff than any other disposition which the defendant might have made of the property."

¹ *Wehle agst. Butler*, 43 How. Pr. R. 5, and cases cited.

² *Brooks v. Olmstead*, 17 Penn. St. R. 24.

A. afterwards met on the road F., "to whom he said he did not know but he had got into trouble, and asked him what he should do. F. said he was going to get leave of the plaintiff to buy the materials of the defendant, and then went and asked the plaintiff if he had any objections to his purchasing, who said he had none, for he had been informed that he should have his remedy against A. F. then told A. he had purchased the materials, and A. drove on with his load." Held that the trespass of A. was not released or extinguished by the subsequent transaction between B. and F.¹ *

¹ Woodruff v. Halsey, 8 Pick. 333.

* Under certain circumstances the court will stay the proceedings in an action of trespass for seizing goods, on the defendant's restoring the goods, or paying the full value of them with the costs of the action (Knot v. Barker, 3 Anst. 896; Hanmer v. Wilsey, *supra*, p. 406, note).

CHAPTER III.

THE TAKING OF PERSONAL PROPERTY BY OFFICER.

1. Goods that may or may not be taken.
2. What essential to constitute an attachment.
3. When personal property bound by levy.
4. Protection afforded to officer by process.
5. Duty and liability of officer in seizing goods.
6. Power and duty of person specially authorized to act officially.
7. Validity of acts of officer *de facto*.
8. Liability of sheriff for illegal acts of deputy.
9. Liability of assessors of taxes.
10. Liability of collector of taxes.

1. *Goods that may or may not be taken.*

§ 447. Apart from any consideration as to what may be specially exempt, all the personal property of a judgment debtor is *prima facie* liable to levy and sale upon execution.¹ If property is so in process of manufacture and transition as to be rendered useless, or nearly so, by having that process arrested, and requiring art, skill and care to finish it, so that when completed it will be a different thing, it is not subject to attachment. Such is bakers' dough, the materials in crucibles in the process of fusion, the burning ware in a potter's oven, a burning brick kiln, or a burning pit of charcoal. The officer cannot be compelled to attach, as he should have the right of removal. Nor is he bound to conduct, by himself or agent, such process, and be responsible to both parties for its successful result.² At common law, with a few exceptions, no property was exempt from distress except such as would necessarily perish or suffer diminution. Hides in a vat could not be distrained, because if exposed to the air and dried during the process of tanning they were afterward incapable of being reduced into leather, and for that reason, it

¹ Dains v. Prosser, 32 Barb. 290.

² Wilds v. Blanchard, 7 Vt. 138.

was held in *Bond v. Ward*,¹ that hides thus situated could not be attached on *mesne* process. Grain in the stack was not liable to distress, because the quantity would necessarily be diminished by removal. But if the landlord found grain upon a cart he might distrain and drive it away.² If grain could be removed without waste, or if hides raised from the vats and becoming dry could be returned again and the tanning completed, the objection to distraining then ceased.³ Where a portion of coal in a pit was made so as to need no further attention and labor, and the residue had so far progressed as to have been entirely burned to coal, though some labor and skill were still necessary in order to separate and preserve it properly, and it did not appear but that it might all have been secured, it was held that if the officer saw fit to attach and take possession of the coal and run the risk of being able to keep it safely, he had a right to do so.⁴

§ 448. At common law, chattels in the actual possession and use of a debtor cannot be taken. In *Coke on Littleton*,⁵ it is said that "although it be of valuable property, as a horse, &c., yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained any more than a horse on which a man is."⁶ In *Sunbolf v. Alford*,⁷ it is stated to be settled law, that "goods in the actual possession and use of the debtor cannot be distrained; a man's clothes cannot be taken off of his back in execution of a *feri facias*." In Massachusetts, under the statute⁸ which provides that "all goods and chattels that are liable to be taken on execution, may be attached, except such as from their nature or situation have been considered as exempted from attachment according to the principles of the common law," an action was brought against an officer for attaching

¹ 7 Mass. 123.

² Co. Lit. 47 b.

³ *Leavitt v. Holbrook*, 5 Vt. 405.

⁴ *Hale v. Huntley*, 21 Vt. 147.

⁵ 47 a.

⁶ *Read v. Burley*, Cro. Eliz. 539, 596; *Simpson v. Hartopp*, Willes, 512.

⁷ 3 M. & W. 248.

⁸ Rev. Sts. of Mass. ch. 90, § 24.

and forcibly taking from the plaintiff his watch, by severing the silken guard to which the watch was fastened, and which passed around the plaintiff's neck. It was held that the defendant was liable for the value of the watch, being a trespasser *ab initio*; and that it was no answer to the action that he tendered to the plaintiff the value of the cord by which the watch was fastened, or that the watch itself, detached from the person, was subject to attachment.^{1*} The ground upon which these and other similar decisions rest is, that it would tend directly to a collision and breach of the peace if articles thus situated were allowed to be taken from a debtor.²

§ 449. By the ancient law of distress, tools were exempt from seizure;³ in which designation are included instruments of small value, used with the direct application of manual strength.⁴ Under statutes exempting tools from seizure and sale, a portable machine, called a billy and jenny, used for spinning, and manufacturing cloth, and also a printing press and type, and other instruments used in printing, were adjudged not exempt from attachment or execution.^{5†}

¹ Mack v. Parks, 8 Gray, 517.

² Com. Dig. DISTRESS, C; Gilbert on Distresses, 43; Gorton v. Falkner, 4 T. R. 565; Storey v. Robinson, 6 Ib. 138; Adames v. Field, 12 Ad. & El. 649.

³ Co. Lit. 47.

⁴ Dailey v. May, 5 Mass. 313.

⁵ Kilburn v. Demming, 2 Vt. 404; Buckingham v. Billings, 13 Mass. 82; Spooner v. Fletcher, 3 Vt. 133.

* In Mack v. Parks, *supra*, the court said: "The watch at the time it was taken by the defendant was in the plaintiff's actual possession and use, worn as part of his dress or apparel, and was severed from his person by force. Such an act, if permitted, would tend quite as directly to a breach of the peace as to take from a man the horse on which he was riding, or the axe with which he was felling a tree. It is, indeed, a more gross violation of the sanctity of the person, and tends to a greater aggravation of the feelings of the debtor. Nor would it be practicable to place any limit to the exercise of such a right. If allowed at all, it must extend to every article of value usually worn or carried about the person. If an officer can sever a silken cord, he may likewise break a metallic chain. If he can seize and take a watch, he may wrest a breast pin or ear ring from the person, or thrust his hand into the pocket and carry off money. He may, in short, resort to any act of force necessary to enable him to attach property in the personal custody of the debtor. It is obvious that such a doctrine would lead to consequences most dangerous to the good order and peace of society."

† "Unless the word tools is taken in its appropriate sense, as applied to simple instruments ordinarily used in manual labor, the exemption will embrace

And cocks in a cockpit were held not to be "implements," within the contemplation of a statute which authorized the

property of a kind and value which, it is obvious, never could have been within the intent and meaning of the statute. It will extend, for aught we see, not only to the implements and apparatus of a printing office, but to the machines, looms, and spindles of a manufactory, and indeed to a great variety of complicated machinery and utensils of great value, all of which will be locked up from creditors. On principles of justice, the property of a debtor should be subject to the satisfaction of his debts; and the exemption in the statute ought not to be extended beyond what the policy and humanity of the law clearly require. If printing presses and types were exempt, it would follow that many other kinds of property would also be exempt; such as lithographic and stereotype plates, engravings for stamping calicoes, pictures, or paper hangings. If it were once established that articles from which an impression is taken, either upon paper or cloth, were exempt, it would be claimed, with propriety, that the machinery with which the paper and cloth were manufactured was also exempt; under which would be classed all the complicated machinery of large manufacturing establishments" (Paddock, J., in *Spooner v. Fletcher*, *supra*).

A wooden boot, hung up at the door of a boot and shoe maker's shop as a sign of his trade, is not a tool. In *Wallace v. Barker*, 8 Vt. 440, which was an action of trespass against a deputy sheriff to recover the value of a wooden boot, which the plaintiff claimed was exempt from seizure and sale at the suit of creditors, the court said: "It is quite obvious that the article in question is not to be ranked among any of the statutory exceptions. It was in no sense a tool or implement of the debtor's trade, but a mere sign or symbol of it. But exceptions must exist independently of the statutes; and the question is, whether any such apply to the present case. In deciding this question, we must keep in view the nature and object of an attachment, as authorized by our law. It is a sort of sequestration of property for the eventual security of the attaching creditor. The property thus taken is to remain in the custody of the law, to await the determination of the suit in which it is attached. And in most instances this is expected to require a considerable period of time. Hence, an exception arises in favor of property which is peculiarly perishable in its nature, as fresh meat during a portion of the year—fresh fish, green fruits, and the like, whenever it is manifest that the purpose of the attachment cannot be effected before they will decay and become worthless. As the policy of the law is not to authorize the destruction of property, but to enable the party attaching to obtain security for his claim, it impliedly forbids an attachment in these cases. The same principle applies when the thing sought to be attached is in such a stage of manufacturing process that its removal by an officer, or the suspension of care and labor upon it by the owner would occasion a loss of the property, or a great damage to it. It is insisted that the principle of exemption extends to all cases where the thing attached could be of no substantial benefit to the creditor as a security, or where it could not be expected to sell for a price bearing any reasonable proportion to its cost, and its real or imaginary value to the owner. Admitting this proposition to be just to some extent, yet any general rule of exemption founded upon it must be difficult of application and of a doubtful policy. Indeed, the power of the court thus to limit and qualify the creditor's right under the statute, may well be questioned when the right can be exercised without injury to the property attached. The present case, however, does not require us to lay down any precise rule upon the subject, since the article in question appears to have possessed a well known value. It was equally appropriate for any one of the trade, and required no alterations on being removed from one shop to another. The papers show that it was sold for about twenty dollars on the creditor's execution. This is evidence of its value as an article of sale, at least among particular tradesmen. In these respects it differed entirely from the

seizure of "any gaming apparatus or implements used or kept and provided to be used in unlawful gaming, in any gaming house."¹ * The rolling stock of a railroad company

ordinary signs of trade and professions. These are known to be of little or no intrinsic value, and useful only to those for whom they are made. We are all agreed that this piece of property was liable to attachment."

Coolidge v. Choate, 11 Metc. 79.

* The case referred to in the text was an action of trespass against a sheriff and his posse for taking, carrying away and destroying game cocks from a cock-pit. The defendants sought to justify their acts by virtue of a sworn complaint made to a justice of the peace and a warrant issued by him to break up unlawful gaming. The judge before whom the cause was tried charged the jury that game cocks were not apparatus or implements of gaming, within the meaning of the statute, in such a sense that they could be seized by an officer on a warrant, or destroyed by order of a magistrate. The defendants' counsel, in support of their exception to the ruling, relied on the Revised Statutes of Massachusetts, ch. 50, § 19, which authorize and require any justice of the peace, or any police court, on complaint made on oath by any person "that he suspects, or has probable cause to suspect, that any house or other building is unlawfully used as and for a common gaming house, for the purpose of gaming for money or other property," to issue a warrant "commanding the sheriff or his deputy, or any constable, to enter into such house or building, and there to arrest all persons who shall be there found playing for money or otherwise, and to take into their custody all the implements of gaming as aforesaid, and to keep the said persons and implements, so that they may be forthcoming before such justice or police court, to be dealt with according to law." Chapter 142, sections 1 and 2, also authorizes magistrates to issue warrants to search for and seize (among other things) "any gaming apparatus or implements used, or kept and provided to be used in unlawful gaming in any gaming house." The Supreme Court, in refusing to disturb the verdict, said: "It has been argued for the defendants that fighting or game cocks may be considered as implements of gaming under the true construction of the statute; that all things by which an illegal game is played must have been intended to be taken by the officer, and that in order to carry out this intent of the law the meaning of the word 'implements' should not be restricted to its strictest sense, but should be enlarged from a literal to a reasonable meaning. But we cannot adopt any such construction of a penal statute. The rule of construction of all penal statutes is well established and is unquestionable. Where a statute inflicts a penalty or fine on the offender, or a forfeiture of his property, it is to be taken strictly. For it is said, 'whenever any ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy, or in favor of natural right and liberty, or in other words, the decision shall be according to the strict letter in favor of the subject' (1 Bl. Com. 88; Christian's note, 19). But all statutes are to be construed according to the popular meaning of their language, if that meaning can be clearly ascertained, except as to technical terms, which are to be taken in their legal sense. We are of opinion that the words 'implements of gaming' were not intended to include fighting cocks, or any animal or being having life, and that the ruling of the presiding judge at the trial on this point is well founded. It is therefore unnecessary to decide whether the cocks taken were lawfully killed or destroyed. For if they were unlawfully taken by the defendants they are responsible, whether the cocks were afterwards destroyed or not. We do not mean, however, to suggest any doubt on this point as to the construction of the Rev. Sts., ch. 142, sects. 2 and 5, under which the defendants maintain that the cocks were lawfully destroyed under the direction of the court or magistrate. By these sections, any 'gaming apparatus or implements used, or kept and provided to be used in unlawful gaming in any gaming house,' are re-

may be attached when not in use, the same as other personal property.¹*

quired to be burnt or otherwise destroyed under the direction of the court or magistrate. The words 'implements' and 'apparatus' have the same meaning and are so defined. No one, we apprehend, ever did or ever would call a living animal an apparatus. Nor is there any reason to suppose that the legislature intended by this statute to authorize a magistrate to burn or destroy any living animal. If cock fighting be a cruel game or sport, as it doubtless is, let the offenders be punished who stimulate the fighting propensities of these animals, and who furnish them with instruments of destruction, or for the purpose of inflicting pain or causing bloodshed, which are not furnished by nature. But why should these animals be burnt or otherwise destroyed? This would be authorizing the cruelty which the law is intended to prevent. Life is the gift of God, not to man only, but to all animals, and it ought not to be taken away except from necessity, or for some useful and proper purpose."

¹ Boston, Concord & Montreal R. R. v. Gilmore, 37 N. Hamp. 410.

* This was an action of trespass against a sheriff for attaching passenger and freight cars and locomotives belonging to the plaintiffs, which the plaintiffs claimed were exempt from seizure and sale. It was argued that the ordinary rule relative to corporations did not apply, for the reason that railroads are public corporations whose property is consecrated to public uses, and therefore, on grounds of public policy, cannot be taken in execution. The court said: "We are unable to see any principle of public policy or convenience which should allow such corporations to mortgage their cars and engines, that would not be equally strong to allow a creditor of the corporation to secure a lien substantially of the same kind by an attachment. In either case the debt must be paid, or the creditor, by suitable proceedings, may cause the property to be applied, by sale or otherwise, to the payment of the debt; and the inconvenience of the public, or to the corporation, is not materially greater in the one case than in the other. It would seem then that so long as the law allows to the corporation the right to deprive themselves by a mortgage, in a greater or less degree, of the power of readily performing their public obligations, and allows them to contract debts which, in the case of others, may be secured by attachment, there can be little reason in denying to the creditor of a railroad the ordinary right to secure his debt by attachment, especially when the debtors can readily relieve themselves from the inconvenience by payment of security." In *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484, the plaintiffs were holders of a mortgage made by the Flushing Railroad Company to them, of their track, buildings, rails purchased or to be purchased, engines, cars, &c. The defendant, as sheriff, levied an execution against the railroad on some of the engines and cars. The question was, whether the property was to be considered as between the mortgagees and execution creditors as fixtures of the road. Strong, P. J., after a full discussion, came to the conclusion that the cars, engines, &c., were properly to be regarded as fixtures, and so not liable to seizure on execution as against the mortgagees, and for the same reason that the mortgages need not be recorded by the town clerk, which was made necessary by the statute to the validity of mortgages of personal property. He reasoned that "railway cars are a necessary part of the whole establishment, without which it would be inoperative and valueless. Their wheels are fitted to the rails, they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else; they are not moved off the land belonging to the company; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are not like farming utensils, and possibly the machinery in factories, and many of the movable appliances in stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom, if ever, changed to any other. In *New Hampshire, Boston, Concord & Montreal R. R. v. Gilmore*, 37 N. Hamp. 410, contro-

§ 450. The word necessary, or necessities, has been considered, in legal phraseology, to extend to things of convenience and comfort, and to such as are suitable to the situation of the person in society, and not to be confined to things absolutely necessary for mere subsistence. A statute exempting from seizure "necessary wearing apparel for immediate use," has been held to include an outside or great coat at all times and seasons of the year, and, in addition to decent and comfortable every day clothing, a full suit to wear abroad or to church.¹ In an action of trespass for taking, by virtue of an attachment, certain household furniture belonging to the plaintiff, the principal question in the case involved the construction given by the court below to the statute, which, among other property, exempted from seizure "bedding and household furniture necessary for supporting

verted the doctrine laid down in *Farmers' Loan & Trust Co. v. Hendrickson*, *supra*. Bell, J., who delivered the opinion of the court, said: "All these things are at least as true of the carts, plows, &c., used on a farm with reference to the farm, yet no one ever imagined them to be fixtures. And to those who habitually see the same cars, and often the same engines, running from the line of Canada to Boston over roads owned by several corporations, the facts assumed appear entirely groundless. No particular cars, nor cars owned by the road, are necessary to operate it, since many roads are operated with the cars of other corporations. The wheels are not fitted to any road in particular, but may be equally useful on any road of similar gauge. The engines and cars are not kept on the road or lands of the same company, but are often used on other roads, and they are subjects of trade as much as coaches or steamboats. The idea that property, either real or personal, may become a mere incident to a franchise, so that the franchise and property shall constitute an entire thing, is not found in any of the books of the common law so far as we are aware. The right to a ferry is such a franchise, and the boats required for the transportation of passengers and their property are entirely indispensable for the discharge of the public duties of the owner, yet we have found no instance where it has been claimed that such boats were exempt from seizure in discharge of the owner's debts. The property of individuals who owe duties to the public is not exempted from liability to the ordinary process of law, except so long as it is in actual use in the discharge of that duty. Such is the case of the contractor to carry the mail. It has never been held that the steamboat or coach and horses used in the conveyance of the mail were exempt when not in use. Considering, then, that it is not necessary for the discharge of the public duties of these corporations that they should be the owners of cars or engines—many such roads being operated with the cars of other corporations; that it is a matter of great uncertainty what articles of the personal property of such corporations are necessary for the discharge of their public duties; that no means exist by which it can be determined what is necessary or otherwise; that it must be very difficult for courts to lay down any definite rule by which officers can be guided, who, in such cases, must decide, at their peril; it seems to be neither judicious nor expedient to establish an exemption of the kind, unless it is done by the direct action of the legislature."

¹ *Peverly v. Sayles*, 10 N. Hamp. 356.

life.”¹ The judge charged the jury that this provision exempted only such articles of furniture as were indispensably necessary for supporting the lives of the debtor’s family. But the court of review held that this was too rigid a construction.² * It was decided that a time-piece was included in a statute exempting from sale on execution necessary articles of household furniture ;³ and the exemption of a cow was held to include the butter made from her milk.⁴ But a statute exempting “one hog and the pork of the same when slaughtered,” does not protect from seizure a second hog while the first remains, either alive or butchered, in the hands of the debtor, the design of the statute being to exempt from process an amount of property sufficient merely for the debtor’s immediate wants.⁵

§ 451. Where one or more articles of a particular kind, or a particular quantity in value, out of several kinds are exempt by law from sale on execution, and the debtor has a larger number or quantity in value, he may determine which he will claim as exempt. The statute giving such exemption is for the benefit of families, from motives of public policy. It confers a personal privilege upon the debtor, which he may waive altogether or insist upon as he may elect ; and he may waive his privilege as to every article but one, and insist upon it as to that article, if it belongs to the kind or class of

¹ Rev. Sts. of Conn. ch. 1, p. 112, § 179.

² *Montague v. Richardson*, 24 Conn. 338.

³ *Leavitt v. Metcalf*, 2 Vt. 342.

⁴ *Ibid.*

⁵ *Parker v. Tirrell*, 19 N. Hamp. 201.

* In an action of trespass for attaching household furniture exempt by statute from seizure, the question whether an apparatus called a range is a stove, is one of fact for the jury (*Montague v. Richardson*, 24 Conn. 338).

Under a statute, that “Every citizen enrolled and providing himself with a uniform, arms, ammunition and accoutrements, shall hold the same exempted from all suits, distresses, executions, or sales for debt, or payment of taxes,” it was held, that a horse and saddle owned by a member of a company of cavalry were not exempt (*Fry v. Canfield*, 4 Vt. 9). Williams, J.: “As to most of the articles which a soldier is obliged to provide, they are useful only as military equipments, and there may be some propriety in exempting those articles from seizure which a man is obliged to provide and keep almost constantly for the use of the public. But a horse, saddle and bridle are kept for common and ordinary use, and a benefit and profit is derived to the owner from their use.”

exempt property.¹ There are many articles of personal property subject to attachment under our laws and usages which could not have been distrained or taken at common law under the rule as stated in the earliest authorities. But in the absence of any proof of usage or custom, from which it may be inferred that a different rule of law has been adopted, the case will fall within the principles on which the English authorities rest, and must be governed by them.²

2. *What essential to constitute an attachment.*

§ 452. The word *attach* derived remotely from the Latin *attingo*, and more immediately from the French *attacher*, signifies to take or touch. The object of attachment is to take out of the defendant's possession, and to transfer to the custody of the law, acting through its officer, the goods attached, that they may if necessary be seized on execution, and be disposed of and delivered to the purchaser. From both of these considerations it is apparent that to attach is to take the actual possession of property. It is not perhaps necessary in any case that the officer should touch the goods.* But to constitute a legal attachment, he must

¹ Lockwood v. Younglove, 27 Barb. 505.

² Mack v. Parks, 8 Gray, 517; Potter v. Hall, 3 Pick. 368.

* The return "attached" where goods belong to a stranger, renders the officer liable; touching or removal not being essential (Paxton v. Steckel, 2 Barr. 93). Hart v. Hyde, 5 Vt. 328, was an action of trespass brought to recover the value of a cooking stove and pipe which had been attached and sold under an execution in favor of Hyde against Hart. Hart was the purchaser of the stove at the sheriff's sale. The stove had been used by Hart as a cooking stove, and being his only stove was exempt from seizure and sale by the statute. About three months previous to the attachment, Hart had temporarily suspended house keeping, and placed the stove in the possession of one Lewis, who was to keep it and pay for the use of it, until it should be called for by Hart. When the stove was attached, Lewis receipted it to the officer, and retained the possession and use of it, until it was sold on the execution, when he also receipted it to Hyde, and still continued to use it. The stove was not removed or in any manner disturbed. After the sale, but before the commencement of the action, Hart called on Lewis for the stove who declined to surrender it. Phelps, J.: "It is insisted that no act of the defendant appears in the case, which amounts in law to a trespass. But we are all agreed, that the act of the sheriff, in assuming the custody and control of the property, was clearly a trespass; and if done by the direction of the defendant, was a trespass in him. There was a literal taking of the property—a seizure on the attachment, as also on the execution, and the placing it under the control of a third person to the exclusion of the plaintiff.

have the custody or control of them, either by himself or his servants, in such a way as to exclude all others, or at least to give timely and unequivocal notice that he has taken possession.¹ An officer for the purpose of attaching a wagon, went with a writ of attachment within five or ten rods of the wagon, which was then in the road in full view. He did not go to the wagon, or remove it, or send any one to do so, or to keep control of it, nor give notice to any one, but went away to attach other property, and did not return until an hour or more. In the mean time, a person in good faith, and without notice, had bought the wagon of the owner, and taken possession of it. It was held in an action of trespass, by the officer against the purchaser, for the wagon that the defendant was entitled to hold it.² In an action of trespass for attaching and carrying away a barouche and harness, it appeared that the plaintiff who was an officer, went to a carriage house, unlocked the door, and at the same time announced that he attached the property within; but that the defendant, who was also an officer with an attachment, arriving at the door, as soon as it was opened sprang in and seized the barouche before the other had actually touched it. A verdict having been found for the plaintiff in the court below, the Supreme Court granted a new trial, holding that as the defendant obtained actual possession of the property, he had a right to take it away under his attachment, which thereby had priority.³*

¹ Lane v. Jackson, 5 Mass. 157; Train v. Wellington, 12 Ib. 495; Lyon v. Road, 12 Vt. 233.

² Fitch v. Rogers, 7 Vt. 403; and see Blake v. Hatch, 25 Ib. 555.

³ Hollister v. Goodale, 8 Conn. 332.

* In an action of trespass *de bonis asportatis*, it appeared that the plaintiff, who was a tax collector, having a tax against the defendant, went to a farm which had then recently been owned by the defendant, but which he had sold to one Smith, who then lived on the farm, and informed Smith that he had distrained the grain and other property belonging to the defendant, for the defendant's taxes. The grain, which had just been thrashed, lay in piles about the barn and granary; and the plaintiff after examining the property, left it without removing it, or in any way interfering with it. He, however, requested Smith to keep it for him, which Smith declined to do; but he agreed to notify the defendant of the distress, when the latter returned, and did so. The defendant having used and disposed of the property, it was held that the

In *Turner v. Austin*,¹ it was held that no overt act of the sheriff was necessary to constitute an attachment of property previously in his custody on another attachment. But there, the sheriff already had the actual custody; and mere form or ceremony for form's sake, and not for the preservation of substance, is never required. In *Denny v. Warren*,² an officer who entered a store to attach goods where there was no competition, received the key from the clerk and locked the store, declaring his intention to attach, was held to have made a sufficient attachment. In *Naylor v. Dennie*,³ inaccessible goods in the hold of a ship were attached by the officer's going on board and leaving a keeper to take care of them. And in *Merrill v. Sawyer*,⁴ it was held that hay in a barn was duly attached by putting a notice of the attachment on the barn door. All of these cases were determined upon the principle, that actual possession and custody are necessary to constitute an attachment; although there being no race for priority of attachment, they held that to be the actual custody and possession which perhaps was only constructive possession.*

plaintiff had not acquired a sufficient possession of it to maintain the action (*Dodge v. Way*, 18 Vt. 457.)

¹ 16 Mass. 181.

² 16 Mass. 420; *S. P. Gordon v. Jenney*, Ib. 465.

³ 8 Pick. 198.

⁴ 8 Pick. 397.

* In Vermont, after the attachment, the officer is required to give notice to the debtor, by delivering a copy before the time of service is out, or he will be considered as abandoning the attachment, and may perhaps be treated as a trespasser *ab initio*. Between the time of attaching and delivering the copy, the officer is considered as having a title to the property, and his possession as legal against all others. When, however, hay or grain is attached, the officer may leave a copy with the town clerk; and this is equivalent to, and declared to be as effectual as if such property had been actually removed and taken into the possession of such officer. He is considered as having the constructive possession, and as having a sufficient title and possession to maintain an action therefor against any one who removes or converts the same. It is not necessary for the officer to go to the place where the property is situated to make the attachment. Leaving a copy with the town clerk is the act of attaching and taking possession, and giving notice to all concerned. A constable having attached hay and grain, by leaving a copy with the town clerk, and having perfected his attachment by giving the debtor a copy, and a judgment having been rendered thereon, and the execution having been issued and delivered to an officer in season to charge the property; it was held that he had such a title and possession as were sufficient to enable him to maintain an action of trespass against another officer, who after the leaving of the copy in the town clerk's office, and before the copy was delivered to the debtor, attached and removed

§ 453. An officer in attaching property is not bound, in order to avoid the implication of fraud, to secure the goods against depredators. The fact that an action of trespass may be supported by him, by virtue of his lien, presupposes the right to leave the property in a situation to be eloiigned by a mere act of trespass.¹ Although the attaching of goods in a building, by taking exclusive possession of the building, and excluding the owner, might be regarded as a trespass *ab initio* as respects the owner, yet the attachment would be valid.²

3. *When personal property bound by levy.*

§ 454. To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession of them, if that be practicable; if not, then he must openly and unequivocally assert his title to them by virtue of his execution.³ But it is not essential to the validity of the levy that the sheriff take actual possession of the goods, or that he remove them from the custody of the debtor. The test of a valid levy is whether enough has been done to subject the officer to an action of trespass except for the protection of the execution. In *Roth v. Wells*⁴ it appeared that the sheriff went to the plaintiff's store, saw the goods, asserted

the same property (*Putnam v. Clark*, 17 Vt. 82). *Stanton v. Hodges*, 6 Vt. 64, was an action of trespass for taking and using up hay and grain which the plaintiff as deputy sheriff had attached on a writ against the defendant, and which the plaintiff did not remove, but left copies agreeably to the statute. It was insisted that the action could not be maintained, for the reason that the plaintiff did not take actual possession of the property. The court said: "The object of the statute is quite apparent, viz: to prevent waste in the removal; and it is idle to say, that the defendant, though he cannot sell the property, and though it cannot be attached, may consume or waste it with impunity. Nor is this inconsistent with general principles. The officer is responsible for the safe keeping of the property. The statute provides that nothing in the act shall be construed to prevent the officer from removing the property where he shall think proper. The officer has thus a lien, or special property, with the right of immediate possession, and may therefore maintain the action" (Referring to *Lowry v. Walker*, 4 Vt. 76).

¹ *Newton v. Adams*, 4 Vt. 437.

² *Ibid.*

³ *Haggerty v. Wilber*, 16 Johns. 287; *Beekman v. Lansing*, 3 Wend. 446; *Westervelt v. Pinckney*, 14 Ib. 123; *Green v. Burke*, 23 Ib. 490; *Camp v. Chamberlain*, 5 Denio, 198; *Barker v. Binninger*, 14 N. Y. R. 270.

⁴ 29 N. Y. R. 471.

his right to them by virtue of his levy, in the hearing of one of the plaintiffs, and subsequently, the fact that a levy had been made was indorsed on the executions, and it was held that the sheriff had done all that was required to perfect a lien on the debtor's goods.¹ In *Copley v. Rose*² it was held that the defendant's saying that he had levied on the property of the plaintiff, showing the execution by virtue of which he acted, and insisting on the levy, was sufficient evidence that the defendant had exercised such dominion over the property as would make him a trespasser.*

§ 455. Where a sheriff has seized goods under one execution, and another execution against the same defendant afterward comes to his hands, the seizure under the first inures by way of constructive levy for the benefit of the second.³ In *Russell v. Gibbs*⁴ this doctrine was applied, though after the first levy and before the receipt of the second execution, the goods were removed out of the State, and remained there until the return day of the second execution had passed. The principle is this:—The object, as well as the effect of an actual levy, is to bring the goods into the possession and under the control of the sheriff for the double purpose of safe keeping and to enable him, by a sale, to apply the proceeds in payment of the debt. After seizure, they are in the custody of the law, or of one of its ministers, until a sale and delivery to the purchaser. An actual levy under the second execution would therefore be but an idle formality.

¹ See *Ray v. Harcourt*, 19 Wend. 495; *Van Wyck v. Pine*, 2 Hill, 666.

² 2 Comst. 115.

³ *Birdseye v. Ray*, 4 Hill, 158; *aff'd* 5 Denio, 619.

⁴ 5 Cowen, 390.

* In general, in case of levy or seizure, the officer merely gives notice to the party, who procures a receiptor. The latter seldom interferes, and often never sees the goods, and the officer may or may not make an inventory. But all parties understand that the goods are seized and in custody of the law; though perhaps the execution is paid without the least actual interruption of the owner's use; and it is entirely clear that, in the absence of right or authority on the side of the officer, he would be liable in trespass. So, if the goods are left, either because they cannot be removed, or because the officer deems them safe where they are, or imagines that they are replevied, the owner who sues him is not to be embarrassed by the objection that a trespass has not been committed.

§ 456. On an execution against one of two partners, joint tenants, or tenants in common, the officer, in levying upon their joint effects, seizes not the mere moiety or share of the defendant in the execution, but the whole of the common interest—the *corpus* of the joint estate—thus bringing it under his exclusive control.¹ The officer acquires such a special property in the goods that he can maintain trespass or trover for them against all persons save perhaps the copartner or cotenant.² In *Bachurst v. Clinkard*³ it was held, that if the goods of two partners be taken upon execution against one, and an execution against the other partner be subsequently received by the sheriff, he is bound to hold them seized, one moiety for the execution against one partner, and the other moiety for the execution against the other partner; and if he return the second writ *nulla bona*, he will render himself liable for a false return. Where an officer having an execution against A. & B. indorsed with directions to levy on their joint property, seizes the separate property of one of them, such property will not be deemed to be in the custody of the law, so as to prevent its being taken under process issued by another creditor.⁴

§ 457. A levy upon goods which the debtor possessed at the time of the levy, cannot operate constructively as a levy upon goods subsequently acquired by the debtor which were never seen by, nor within the power of the levying officer during the life of the execution.⁵ Where, however, it appeared that the plaintiff had sold part of the goods which had been levied upon; that other goods of the same general description had been purchased by him and put in the places from which the other goods had been taken, and that he had neglected, after request, to designate

¹ *Phillips v. Cook*, 24 Wend. 389.

² *Coll. on Part.* 474; *Watson on Sheriffs*, 18, 191; *Heydon v. Heydon*, 1 Salk. 392.

³ 1 Show. 173.

⁴ *Sherry v. Schuyler*, 2 Hill, 204.

⁵ *Roth v. Wells*, 29 N. Y. 471.

the goods on which the levy was made, it was held that such substituted goods were liable on the execution. The substituted goods became liable, because the plaintiff having voluntarily mingled goods not liable to be sold, with those that were liable, he could not maintain an action against the officer for selling such substituted goods.¹ To permit an action to be maintained under such circumstances would be a fraud upon both the officer and the party whose process he held.² *

¹ *Ante*, § 405.

² *Roth v. Wells, supra.*

* At common law, the writ of *fiery facias* bound the goods of the debtor from the time the writ was tested, which often preceded by a whole vacation the time of its delivery to the sheriff. This effect given to the writ by relation often operated very unjustly, especially as against *bona fide purchasers*; and to prevent that evil, it was declared by the statute of frauds, 29 Car. 2, ch. 3, § 16, that goods should be bound only from the time when the writ should be delivered to the sheriff to be executed. That statute was early re-enacted in New York (1 Rev. L. 501, § 6); and by the New York Revised Statutes of 1830, the protection of *bona fide* purchasers was further extended to the time of actual levy (N. Y. Rev. Sts. 5th ed. vol. 3, p. 645, § 17). These provisions are continued in force, and are applicable to executions against property under the New York Code (N. Y. Code, §§ 286, 289). In New York, therefore, the goods of the defendant in an execution, as against him, are "bound from the time of the delivery of the execution to the sheriff, to be executed" (3 N. Y. Rev. Sts. 5th ed. p. 644, § 13); and the reason upon which this rule is founded extends the lien to all goods acquired by the defendant within the jurisdiction of the sheriff during the life of the execution. This lien is created by law for the benefit and security of the plaintiff; it cannot be defeated by any act of the defendant short of a sale to a *bona fide* purchaser; and it is not lost by the neglect of the sheriff to levy upon or to take the goods into his custody during the life of the execution, but may afterward be enforced by the sheriff, without such prior levy (*Roth v. Wells*, 29 N. Y. R. 471, per Selden, J., citing 1 Saund. 219 *e*, note *t*; *Ray v. Birdseye*, 5 Den. 619; *Hotchkiss v. McVickar*, 12 Johns. 403).

In *Lambert v. Paulding*, 18 Johns. 311, a sloop had been removed by the defendant in an execution, from the city and county of New York to the county of Westchester, after the delivery of the execution to the sheriff of New York, and before any levy. The next day after the removal, the sheriff of Westchester levied upon the sloop by virtue of an execution in favor of another plaintiff against the same defendant; and having afterward sold her, he was ordered, on motion made in behalf of the plaintiffs in the first execution to pay the proceeds of the sale to them—such proceeds being less than the amount of their execution. The court said: "The delivery of the *fiery facias* to the sheriff of the city and county of New York, bound the goods of the defendant then in his bailiwick, and the plaintiffs in that execution cannot be deprived of the lien on the sloop, which was then lying in New York, by the act of the defendant in removing the vessel into another county. He would be liable to an action at the suit of the sheriff for so removing the property." In *Roth v. Wells, supra*, Selden, J., referring to the foregoing case, said: "As the lien could be enforced only through the action of the sheriff, he had, I think, a right, by virtue of it as against the defendant, to seize and sell, after the expiration of the execution, any property upon which such lien may have attached, although no previous actual levy had been made. The death of the defendant after the issuing of an execution and before a levy, does not prevent the sheriff from seiz-

§ 458. Although the leaving of goods by an officer, after levying upon them, in the possession of the debtor, may render the officer answerable to the creditor, or involve him in difficulty with third persons, yet it will not constitute an abandonment of the levy, so far as the debtor himself is concerned. As to him the property is still in the custody of the law, and the officer may come again at pleasure to complete the execution of the process.¹ The removal of property out of one State into another by an attaching creditor, to whom the same has been delivered for safe keeping by the attaching officer, does not dissolve the attachment.^{2 *}

ing and selling the goods of the defendant after his death, 'for, by the execution awarded, the goods are bound.' If the goods are bound after the death of the defendant, and after removal from the county without levy, they must be equally bound after the return day of the writ. The spirit of the rule which declares execution to be the life of the law, and which creates the lien without a levy, requires the continuance of such lien after the return day, so long as the rights of purchasers or of other creditors do not intervene. It is the duty of the defendant to satisfy the execution as well after the return day as before, and no wrong can be done to him by continuing the lien which has once attached upon his goods, until he makes such satisfaction."

¹ *Glover v. Whittenhall*, 6 Hill, 597.

² *Utley v. Smith*, 7 Vt. 154.

* This was an action of trespass for taking certain articles of personal property. On the trial, in the court below, it was proved that the property had been attached, at the suit of the plaintiff, in the State of New York, as belonging to one Hartwell, and by the attaching officer there delivered to the plaintiff, he agreeing to redeliver the same on demand, or account for it to the officer, and that the officer should not be liable to the plaintiff if the property should not be returned. The plaintiff carried the property into Vermont, and before the return day of the attachment the defendant took the property from the plaintiff on attachment against Hartwell, returnable in Vermont. The judge directed a verdict for the defendant, on the ground that the lien both of the officer and the plaintiff, occasioned by the attachment in New York, was discharged by carrying the property into Vermont, and that it was thereby made liable to attachment as the property of Hartwell. The Supreme Court, in reversing the judgment, said: "This property was legally attached in New York, and a qualified property thereby created in the officer to the property, for which he was liable to the plaintiff to answer the debt, or to Hartwell, if the attachment was otherwise discharged. It is obvious that this liability of the officer would continue both to the plaintiff and Hartwell, though the officer or his agent should convey the property into another State; and if his liability would continue, it is difficult to see why his qualified property, thus legally created, should not also continue and be recognized in a sister State. The legal possession being in the officer, he may deliver it to another for safe keeping, who thereby has the legal possession, the invasion of which is a trespass. The condition in the plaintiff's receipt, that he would return the property to the officer on demand, and that the officer should not be liable to the plaintiff if the property should not be returned, does not alter the case, as such would have been the effect had the receipt been silent on the subject. The remaining question is, inasmuch as the property was delivered to the attaching creditor, and was taken by the creditors of the owner, is not the officer discharged from both, and so his qualified property ended, on the

§ 459. The right to attach and levy upon the property of a debtor pertains to the remedy, and depends upon the law of the place where the property is found and attached.¹ For instance, if a debtor's property of a certain kind, and to a certain amount which is exempt from attachment and levy by the law of one State, is taken into another, it is liable to attachment in the latter, unless exempt by its law. It was accordingly held, in Vermont, that a person's only cow could not be taken on attachment or execution, notwithstanding the owner of the cow lived in Canada, and the cow had strayed therefrom into Vermont.² * In *Rice v. Courtis*,³ the

ground that the creditor can never claim of him, as he took the property and never returned it, and the debtor can have no claim, as his creditors took and legally held it? This question may first be considered as unconnected with any change of the property from one to another jurisdiction. It has ever been the practice in this State, that the officer makes the attaching creditor keeper of the property, if he is a responsible man and willing to undertake the trust. If the above doctrine be true, the debtor might, in such case, take the property from the creditor with entire impunity. This proves too much, and is inconsistent. In the second place, this attaching officer's liabilities were not ended. If, after settling the plaintiff's debt, Hartwell should call for his property, it would not be a defense for the officer or the plaintiff to say that they had removed the property to another State where it was subject to different process, and exposed in a different market, and there it was taken by other creditors. The responsibility and qualified property in the officer continued, and therefore this action may be sustained."

¹ Story on Conf. of Laws, 462.

² *Haskill v. Andros*, 4 Vt. 609.

³ 32 Vt. 460.

* In this case, the court said: "It has been correctly urged, that the law of the place where a remedy is attempted to be enforced must always govern the proceedings had to enforce the remedy. Whatever remedy our laws give to enforce the performance of a contract, will equally avail the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction, must yield to all the requirements which are made of our citizens in relation to the collecting of debts or maintaining suits, and is clearly entitled to all the benefits, exemptions and privileges to which other debtors or suitors belonging to our State are subject or entitled. If the one can hold a cow, suitable wearing apparel and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress."

Where in an action of trespass, brought to recover the value of a quantity of intoxicating liquor claimed by the plaintiff, and which was taken by the defendant by attachment, on a writ against a third person, it was urged, in behalf of the defendant, that the court below was wrong in charging the jury that if the liquor was purchased by the plaintiff in New York, with the intent to sell it in

question presented was whether, where personal property had been assigned for the benefit of creditors by an act done legally out of the State, any change of possession was requisite in Vermont, in order to place it beyond the reach of process of the Vermont courts against the assignor. It was urged that such a change of possession was required, in order to perfect the assignment when made out of the State, because it was a rule of policy uniformly required in the transfer of all personal property within the State as a visible index of its being no longer liable upon process against the former owner; that it was no part of the contract of assignment to be controlled by the law of the place of assignment, but a matter purely of local policy, to prevent fraud, and therefore not a matter to be controlled by the contract, or by the law governing the contract, but a local form or act to be governed by the law of the forum where the property was situated and the remedy sought. It was held, that the requirement of a change of possession in the transfer of personal property, in order to put it beyond the reach of the process of the State courts, against the former holder, was a matter so far affecting the settled policy of the jurisprudence of Vermont on the subject, that it could not be dispensed with out of deference or comity to the law of any other State.*

§ 460. Whether goods carried from one State into another by a debtor are to be regarded as his property for the purposes of attachment and levy, or the property of a

New Hampshire in violation of the law of that State, and was on its way across Vermont to New Hampshire for the purpose of being so sold, that would not prevent the plaintiff's recovery against a mere trespasser, the Supreme Court said: "There is nothing in the laws of this State that prohibits the inhabitants of any of the other States from transporting intoxicating liquor across this State to an adjoining State, even though with the intent to sell it in violation of the laws of such adjoining State. It is no violation of the law here, and the courts of this State are not called upon to protect the inhabitants of New Hampshire against the violation of their laws" (*Harrison v. Nichols*, 31 Vt. 709).

* Although where, in an action for taking property, the defendant justifies under an attachment issued in another State, it is incumbent upon him to show that the process was according to the law of that State; yet if the objection be not made at the trial, it will be deemed waived (*Doane v. Eddy*, 16 Wend. 523).

mortgagee who has acquired a lien on them by the law of the place of the contract, does not seem entirely settled. In *Cobb v. Buswell*,¹ the plaintiff claimed title to certain personal property, for which the action was brought, under three chattel mortgages from one Wooster to him. The defendant justified the taking under writs of attachment and executions against Wooster. It was admitted that the mortgages were regularly executed and recorded according to the laws of New Hampshire, where the parties lived, and where the property was then situated, and that by the statute of New Hampshire, the plaintiff might let the property remain in the possession and use of the mortgagor without rendering it liable to attachment as the mortgagor's property. The question was whether the taking of the property by the mortgagor into Vermont subjected it to attachment by his creditors, although not so liable under the laws of New Hampshire. It was held that it did not, and that, therefore, the plaintiff was entitled to recover.* The case of *Montgomery v. Wight*² arose between a mortgagee under a mortgage executed in Canada, and an attaching creditor under a subsequent attachment in Michigan. The mortgagor resided in Michigan, and owned, and was in possession of the horse in question, at Detroit. He subsequently removed into Canada, and took the horse with him, and executed the mortgage in Canada, under a statute by which the mortgage was valid without a change of possession. Afterward, having lived in Canada about a year, he took the horse to Detroit, to be trained, and, after the horse had been there about six weeks, it was attached as the property of the

¹ 37 Vt. 337.

² 8 Mich. 143.

* *Woodward v. Gates*, 9 Vt. 358, involved an inquiry into the validity of a chattel mortgage executed in New Hampshire. But the court decided the case upon the ground that the statute of New Hampshire regulating mortgages of personal property had not, in that case, been complied with. Williams, Ch. J., however, in delivering the opinion of the court, remarked that "The only remaining question is, whether the statute of New Hampshire protects the property of the plaintiff against the attachment of the defendants. If the statute had been complied with, my individual opinion is, that it could not have availed the plaintiff. The property, when in this State, was subject to attachment at the suit of the creditors of the vendor, so long as his possession remained unchanged."

mortgagor. The statute of Canada required the mortgage to contain a particular description of the property, and the court held, on the authority of decisions of the Canadian courts, that the mortgage was void by the law of Canada, as against creditors, for want of a more particular description of the property. That point, they held, was decisive of the case. The court, however, expressed the opinion that the attachment would still have prevailed if the mortgage had been valid by the laws of Canada.*

4. *Protection afforded to officer by process.*

§ 461. We have seen¹ that a mere ministerial officer who executes the process of a court having jurisdiction of the subject-matter, and authority to issue such process in general, or in certain specified cases, is protected in the execution thereof, when it is regular on its face and apparently within the jurisdiction of the court issuing it.²† The general rule

¹ *Ante*, § 334.

² See *Savacool v. Boughton*, 5 Wend. 170; *Churchill v. Churchill*, 12 Vt. 661; *Parker v. Walrod*, 13 Wend. 296; *aff'd* 16 Wend. 514; *Steel agst. Fish, Brayt.* 230; *Reed v. Conway*, 20 Mo. 22; *Hamilton v. Williams*, 26 Ala. 527; *Keniston v. Little*, 10 Fost. 318; *State v. Weed*, 1 Ib. 262.

* In determining which law shall govern, the domicil of the contracting parties at the time of the contract, the place of the contract, and the *situs* of the property at the time of the contract, are all to be considered. It is sometimes said that personal property has no *situs*, and for some purposes it is true, or, more properly, it is for some purposes immaterial; but for other purposes, and as applicable to questions of this character, the actual *situs* of the property is not to be disregarded. Much of the conflict in the decisions on this subject has arisen from the different effect different courts have given to these several considerations, where the place of the contract, the domicil of the parties to it, and the *situs* of the property have been not all in one jurisdiction at the time of the contract (*Cobb v. Buswell*, 37 Vt. 337).

† Where in an action of trespass against the commander of a United States frigate, for bringing to and taking out of her course a neutral vessel, by reason of which the vessel was captured by another nation, it appeared that the acts of the defendant were pursuant to instructions from the United States naval department, and no collusion was shown between the captors and the defendant, it was held that he was not liable (*Ruan v. Perry*, 3 Caines, 120).

Haskell v. Sumner, 1 Pick. 459, was an action of trespass *de bonis asportatis*. The defendant justified that he, as deputy sheriff, levied on the goods and effects of the plaintiff, in the hands of A. B. and C., they having come into court and disclosed that they had in their hands the goods and effects in question, and being thereupon adjudged the trustees of the plaintiff, to which the plaintiff replied that the property was exempt from attachment and execution. It was held that the action could not be maintained. The court said: "A person may

is, that where the subject-matter of any suit is not within the jurisdiction of the court applied to for redress, everything done is absolutely void, and the officer, as well as the party, becomes a trespasser; but that when the subject-matter is within the jurisdiction of the court, and the want of jurisdiction is to the person or place, then the officer is excused, unless the want of jurisdiction appears in the process.¹ In the case of the *Marshalsea*,² Sir Edward Coke, in exemplifying the distinction in this respect between a proceeding *coram non judice* and a proceeding *inverso ordine*, or erroneous, says: "If the Court of Common Pleas, in a plea of debt, doth award a *capias* against a duke, earl, &c., which by law doth not lie against them, and the same appeareth in the writ itself, yet if the sheriff arrest them by force of the *capias*, although that the writ be against law, notwithstanding, inasmuch as the court hath jurisdiction of the cause, the sheriff is excused." In that case, a *capias* was an irregular process. The proceeding should have been by *summons* and *distrin-*

be a trustee for having in his possession a specific article, or for owing the debtor a sum of money. No appeal was made from the judgment, and an execution was issued directing the officer to take the goods of the principal in the hands of the trustees. They gave to the officer several articles of which they had been held trustees, and the officer sold them in the ordinary manner. This comes within the common case of an officer protected in his acts of obedience to a proper authority. The defendant had no right to look behind the judgment of the Court of Common Pleas. All that we decide is, that trespass will not lie under these circumstances."

Scott v. Sherman, 2 Wm. Blackstone's R. 977, was an action of trespass against custom-house officers for entering the plaintiff's house and carrying away some wines called Geneva, which had been removed that morning from the plaintiff's ship to his dwelling, and which constituted part of the ship's stores. The defendants introduced in evidence a record of condemnation of the Geneva in the Court of Exchequer at a prior term. The Court of King's Bench held that the plaintiff could not recover, because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it followed as a necessary consequence, that neither trespass nor trover could be maintained for taking them in an orderly manner; for the condemnation related back to the time of seizure. It was added that, as the plaintiff knew of their seizure, and was notified of the condemnation by two proclamations, according to the course of the court, it was his duty to have put in his claim, and, neglecting this, he was forever barred by the condemnation not only with respect to the goods themselves, but every other collateral remedy for taking them.

¹ *Cloutman v. Pike*, 7 N. H. 209; *Barnes v. Barber*, 1 Gilman, 401; *Parker v. Smith*, Ib. 411; *McDonald v. Wilkie*, 13 Ill. 22; *Tefft v. Ashbaugh*, Ib. 602; *Milburn v. Gilman*, 11 Mo. 64.

² 10 Co. R. 76.

gas. Yet, as the court had jurisdiction in actions of debt against peers of the realm, the sheriff was justified under the *capias*, although peers were not amenable in that mode.*

§ 462. In England, a distinction was made at an early day between process issued by courts of general and special jurisdiction, holding that to render process issued by the latter a justification for him who executed it, it must appear that he who issued the process had jurisdiction in the particular case in which the process issued. This rule was applied in *Nichols v. Walker and Carter*,¹ which was an action for entering the plaintiff's house and taking away his goods. Carter was a churchwarden, and Walker an overseer of the poor of the parish of Hatfield, and they attempted to justify what had been done under a warrant from three justices of the peace requiring them to collect a poor rate which had been assessed upon the plaintiff. It appeared that the plaintiff was not liable to be taxed. It was claimed that as the defendants acted under a warrant from the justices they were excused. But it was held, that as the rate was not legally assessed upon the plaintiff, the warrant did not justify the defendants. The court said: "It is not like the case where an officer makes an arrest by warrant out of the

¹ Cro. Char. 394.

* Where the plaintiff procured a second execution to be issued by a justice after the first had been indorsed satisfied, it was held that, as the process was regular upon its face, and issued by a magistrate who had jurisdiction of the subject-matter, the officer was justified in proceeding under it, it being the duty of an officer to execute process regular upon its face and within the legitimate power of the court issuing it, without first inquiring into the regularity of the previous proceedings (*Lewis v. Palmer*, 6 Wend. 367).

It was well observed by Chief Justice Nelson, in *Webber v. Gay*, 24 Wend. 485, that "to go beyond the rule that, if the court has jurisdiction of the subject-matter, and the process is regular on its face, the officer will be protected, would lead to a new and troublesome issue which would tend greatly to weaken the reasonable protection to ministerial officers. Their duties, at best, are sufficiently embarrassing and responsible. The experience of the officer will soon enable him to determine whether the process is in regular form or not, or he can readily obtain the necessary advice. But he must be presumed wiser than the magistrate, if even a knowledge of the proceedings would enable him to decide correctly, if they happened to be erroneous."

Case, and not trespass, is the proper remedy for malicious motive and want of probable cause in the execution of process regular on its face (*Smith v. Miles*, 1 Hemp. 34).

king's court, which, if it be error, the officer must not contradict, because the court hath general jurisdiction. But here the justices of the peace have but a particular jurisdiction to make warrants to levy rates well assessed." But in *King v. Danser*,¹ Lord Kenyon said: "A distinction indeed has been made with respect to the persons against whom an action may be brought for taking the defendant's goods in execution by virtue of the process of an inferior court, where the cause of action does not arise within its jurisdiction, the plaintiff in the cause being considered a trespasser, but not the officer of the court." And in *Ladbroke v. Crickett*,² Buller, J., remarked that "if upon their face the court had jurisdiction, the officer was bound to execute the process, and could not examine into the foundation of them, and that will protect him."

§ 463. In New York, an officer who executed process issued by a court without jurisdiction was formerly held to strict accountability. In *Cable v. Cooper*,³ it was affirmed that "every tribunal proceeding under special and limited powers decides at its peril, and hence it is that process issuing from a court not having jurisdiction is no protection to the court, to the attorney, or the party, nor even to a ministerial officer who innocently executes it. This is a stern and sacred principle of the common law which requires to be steadily guarded and maintained." But in *Savacool v. Boughton*,⁴ the non-liability of the officer was asserted, on the ground that it was unjust to hold him liable as a trespasser for doing what it was his duty to do, without knowing, or having the means of knowing, whether his process was or was not invalid. In a subsequent case,⁵ the court said: "The law imposes various duties upon ministerial officers, to the discharge of which they are absolutely bound provided there is no jurisdiction. And though there be a

¹ 6 Term R. 242.

³ 15 Johns. 152.

⁵ *Earl v. Camp*, 16 Wend. 562.

² 2 Term R. 653. See *ante*, § 335.

⁴ 5 Wend. 170.

total want of jurisdiction, if it be not apparent on the face of the process, the law will not put them to inquire and judge of the case. In general, they ought not to look beyond the process, and in no case need they do so. Their duty is usually to arrest the person or take the goods of another. Wherever there is jurisdiction of the process, the law means to make the officer safe in yielding implicit obedience.”¹ Subsequently it was held that process regular upon its face would protect the officer, though issued without authority,² and though he had knowledge of facts rendering it void for want of jurisdiction.³ * In *Porter v. Purdy*,⁴ it was said that the same consideration should excuse a commissioner of highways, or trustee of a village, when they are required to act upon evidence which they cannot be presumed to know is forged, and are without means of determining whether it is or is not genuine. “If,” said Mullin, J., in delivering the opinion of the court, “in such case there is a want of jurisdiction, the proceeding should be reversed or annulled. But the officer should not be held to be a trespasser unless he knows, or has reason to know, that he is acting without jurisdiction.” †

¹ And see *Lyon v. Yates*, 52 Barb. 237; *Kerr v. Mouat*, 28 N. Y. 659; *Wilton Manf. Co. v. Butler*, 34 Maine, 431.

² *Noble v. Holmes*, 5 Hill, 194; *Cornell v. Barnes*, 7 Ib. 35.

³ *The People v. Warren*, 5 Hill, 440. ⁴ 29 N. Y. 106.

* In the *People v. Warren*, *supra*, the defendant was convicted of assault and battery upon an officer in resisting an arrest under a warrant issued by inspectors of election, and it was held that the knowledge of the officer that the inspectors had not jurisdiction did not affect his right to make the arrest (s. p. *Webber v. Gay*, 24 Wend. 485). The rule which justifies the officer when acting under process regular on its face is one of protection, not of assault—a shield but not a sword. The officer, when sued, may defend under such process, but he cannot build up a title upon it which will enable him to maintain an action against third persons. See *Sturbridge v. Winslow*, 21 Pick. 83. Two officers proceeded under attachments in favor of different creditors, which, though void as to the parties in whose favor they issued, were regular upon their face, and without any apparent defect of jurisdiction on the part of the magistrate who issued them. It was held that the officer who levied first, and out of whose custody the other officer took the property, could not maintain trespass for the taking (*Horton v. Hendershot*, 1 Hill, 118). An action of trespass cannot be maintained for the violation of an elector's privilege, under lawful and regular process, though done maliciously (*Swift agst. Chamberlain*, 3 Conn. 537).

† In *Fox v. Wood*, 1 Rawle, 143, the collector of a militia fine was protected, though the delinquent was exempt from military duty. The contrary seems to

§ 464. An officer is bound to obey, without looking into the grounds of action, any precept put into his hands to serve, which appears on its face to be regular and to have been issued by competent authority; and his private knowledge of facts showing that there is no cause of action, will not change his duty or liability.^{1*} *Watson v. Watson*² was an action

have been held by the Supreme Court of the United States in *Wise v. Withers*, 3 Cranch, 331. The plaintiff in the latter was a magistrate in the District of Columbia, and as such not subject to military duty. He was fined for neglect of such duty, and a warrant for the collection of the fine issued to the defendant, who seized his property thereon. For this act he was prosecuted. The court said that it was a settled principle that the decision of such a tribunal in a case clearly without its jurisdiction would not protect the officer acting under it, and that the court and officers would all be trespassers. In *Savacool v. Boughton*, 5 Wend. 170, Marcy, J., in commenting upon the case of *Wise v. Withers*, said: "The only point much considered in the case was that which involved the question as to the plaintiff's exemption from military duty, but that which related to the defendant's protection under his warrant was only glanced at in the argument of the counsel and in the decision by the court. The distinction contended for in this case was scarcely raised there, and the attention of the court does not appear to have been drawn to a single case in which it has ever been noticed. The Chief Justice, in the opinion of the court, merely observes that it is a principle that a decision of such a tribunal (a tribunal of limited jurisdiction), clearly without its jurisdiction, cannot protect the officer who executes it. I would with deference ask whether there is not an error in the application of the principle which the Chief Justice lays down to the case then before the court? He must mean by a decision being clearly without the jurisdiction of the court, a sentence or judgment on a matter not within its cognizance. Was the subject-matter of that cause beyond the cognizance of a court-martial? It appears to me that it was not. The power and duty of the court was to punish and fine delinquents, consequently it had jurisdiction over the subject-matter, but not over the person. There was nothing in the process which the ministerial officer executed to apprise him that the court had not jurisdiction of the person. It seems to me that it was not a case to which the principle laid down by the court was applicable, but it would have been such a case if there had been a want of jurisdiction over the subject-matter. I can scarcely consider, therefore, the determination of the Supreme Court of the United States in the case of *Wise v. Withers* a deliberate decision on the question now before us."

The statute of Tennessee of Nov. 20, 1861, establishing an ordinance bureau, &c., empowering the governor of the State to commission persons in each county to collect the arms of the citizens, and fining those who refused to give them up, was held to be a violation of the bill of rights, which permits citizens to keep and bear arms for the common defense, and one who, being duly commissioned under the statute, took a person's gun away from him, was held personally liable as a trespasser (*Smith v. Ishenhour*, 3 Cold. Tenn. 214).

¹ *Belk v. Broadbent*, 3 Term R. 183, 185; *Brainard v. Head*, 15 La. An. 489; *Grumon v. Raymond*, 1 Conn. 40, Daggett, J., dissenting.

² 9 Conn. 140; and see *Cornell v. Barnes*, 7 Hill, 35, and *Earl v. Camp*, 16 Wend. 562, *contra*.

* *Badkin v. Powell and others*, Cowp. 476, was an action of trespass brought against two persons for taking the plaintiff's horse and cart, and also against the pound keeper for receiving them. The original taking was admitted to be wrongful; and the court held that, as the pound keeper was bound to take and keep whatever was brought to him, at the peril of the person who brings it, he

of trespass against a constable for taking and carrying away a horse, under a writ of replevin which commanded him to cause the beasts of the plaintiff, impounded or distrained, to be replevied. It was proved that the horse in question was not impounded or distrained, and that the defendant knew it. From this, the plaintiff argued that the defendant ought not to have served the replevin, and that in so doing he became a trespasser. It was, however, held that, as the defendant was a legal officer, it was his duty, regardless of any knowledge or supposed knowledge of his own that there existed no cause of action, to serve the writ committed to him; that the facts on the face of the writ constituted his justification, because he was obliged to obey its mandate, and it was not any part of his duty to determine whether the allegations contained in the replevin were true; that being an executive officer, it was his duty to execute, and not to decide on the truth or sufficiency of the processes committed to him for service; and, therefore, if they were issued by competent authority, and with legal regularity, and so appeared on their face, he was justified for every act of his within the scope of their command.

§ 465. Where, however, the process shows on its face that the court issuing it had not jurisdiction, the officer who attempts to execute it will be a trespasser;¹ and this liability applies to a case where the want of jurisdiction arises from a fact of public notoriety which is presumed to be equally within the knowledge of the officer as well as others, and of which he is, therefore, bound to take notice.² *Adkins v. Brewer*³ was an action of trespass for seizing and selling the goods of the plaintiff under a void attachment, issued by a justice of the peace, without proof of absence or concealment,

was not a trespasser. Lord Mansfield remarked that "It would be terrible were he liable to an action for refusing to take cattle in, and also liable in another action for not letting them go."

¹ *The State v. Mann*, 5 Iredell, 45; *Whitfield v. Johnston*, 1 Ib. 473; *Sprague v. Birchard*, 1 Wis. 457.

² *Parker v. Walrod*, 13 Wend. 296; *aff'd* 16 Ib. 514.

³ 3 Cowen, 206; and see *Van Steenburgh v. Korts*, 10 Johns. 167.

and without bonds being taken pursuant to the statute. It appeared that the property in question was sold by a constable, under eight other executions older than the void one; that the constable levied and sold under all the executions, at the same time, indiscriminately; and that the void execution, as well as the others, was satisfied by the sale and the money paid to the plaintiff. It was held that all concerned were trespassers. But where goods have been seized under a void process, the officer may afterward execute a legal warrant, the subsequent valid seizure not being vitiated by the previous trespass.¹* *Gile v. Devens*² was an action of trespass against a United States marshal for seizing

¹ *Percival v. Stamp*, 9 Exch. 167; *Hooper v. Lane*, 6 H. L. C. 448.

² 11 Cush. 59.

* Where goods are wrongfully seized under a writ, there is a broad and well recognized distinction between the cases of process which is void or set aside as illegally sued out, and a writ liable to be abated and which is afterward actually abated. In the former, the process is considered as never having issued, so far as concerns the party who sues it out. If goods be taken on an execution which was illegally issued and afterward set aside on that account, and an action of trespass be brought therefor, the defendant cannot justify under the execution because it has not and never had any legal existence. But an original writ that is abatable may or may not be abated, according to the defendant's plea. If it be afterward abated, it is by judgment of the court; and the writ, so far from being a mere nullity, becomes a record, and is the foundation of the judgment which the court renders. In the one case, an action of trespass may be maintained; while, in the other, an action upon the case is the proper and exclusive remedy (See *Hayden v. Shed*, 11 Mass. 500).

A defective affidavit, which may be amended, will be a good defense in an action of trespass against those acting under it in attaching the property of a non-resident debtor (see *State v. Foster*, 10 Iowa, 435).

No defect should render process entirely void, where the matter intended can be understood, however defective the mode of expression. Process may be regarded as voidable by reason of defects, without serious prejudice to the rights of parties, because such defects are, in their nature, amendable under the orders of the court upon such reasonable terms as may be just to both parties; and such defects may be waived or released by agreement of parties, or by such acts of the party entitled to take advantage of them, as show that they are not relied upon, as suffering a default, pleading over to the merits, and the like. But it is otherwise with such defects as render process void. Parties who have acted ignorantly, under such invalid process, may be subjected to be treated as wrongdoers and trespassers, where they have intended to act with entire propriety. And courts will hardly hesitate to sustain such process, where, without violence to the ordinary usages of language, it may be so understood as to render it legal and operative (*Kelly v. Gilman*, 9 Post. 385).

Where a warrant, to collect a fine, issued by a militia officer, recited that the same was imposed by C. S. Captain, but it was signed "C. S. Jun. Captain," it was held that the process was legal, junior being, in law, no part of a person's name (*Brainard v. Stilphin*, 6 Vt. 9).

the plaintiff's goods. It appeared that the goods were, at first, attached in the plaintiff's store, as the property of one Cobb, and that a few hours afterward, it having been discovered that the goods did not belong to Cobb, but to the plaintiff, the writ was altered by inserting therein the name of the plaintiff as joint defendant with Cobb; and the goods were thereupon a second time attached as the property of Gile the present plaintiff. The plaintiff contended, that during the time the defendant held the goods on a writ against Cobb alone, he was clearly a trespasser; and that, after the alteration of the writ, he was still a trespasser for two reasons:—1st. That the first attachment being tortious, and the goods having been held under it up to the time of making the second attachment, such new attachment was not valid; 2d. That the alteration of the writ, after the officer had made an attachment upon it, rendered the second attachment a nullity. At the trial in the common pleas, the judge ruled that, as the original attachment was tortious, the officer could not, while he held such tortious possession and attachment, make a new attachment under which he could justify. But the Supreme Court held, that the plaintiff was only entitled to judgment for the amount of the injury which he had sustained in consequence of the first attachment; that the alteration of the writ furnished no objection to the defendant's proceedings under it; and that, if the writ had been bad, the plaintiff ought to have objected to it by plea in abatement or motion to dismiss, and the defendant could not be treated as a trespasser for serving it.

§ 466. The extent of the officer's liability in executing a writ in replevin does not seem to be settled; some of the cases have held that where the command of the writ is to replevy and deliver certain specified chattels, the process will be sufficient protection to the officer, though he take the chattels from the possession and they are the property of one who is a stranger to the writ, unless the person in possession claims the goods when the officer comes to demand them,

and the officer takes them, notwithstanding such claim of property.¹* *Foster v. Pettibone*,² was an action of trespass commenced before the enactment of the New York Code, brought for the taking by the defendant of a quantity of flour, the property of the plaintiff. The defendant, at the time of the taking, was sheriff of the county of Cayuga, and took the flour from the possession of one Baker, under a writ of replevin issued in a suit in favor of one Brown against Baker, directed to him and requiring him to take the property. The question in the case was, whether the present defendant was liable as a trespasser to the present plaintiff, the owner of the flour, for taking it as a sheriff, in obedience to the writ. Or, in other words, whether trespass could be maintained by the owner of goods against a sheriff for taking them under a writ of replevin, against another person having the goods in possession. The referee before whom the action was originally tried, nonsuited the plaintiff, on the ground that the defendant was justified by the writ; and the ruling of the referee was afterward affirmed by the Supreme Court.†

¹ *Hallett v. Byrt*, Carthew, 380; *Willard v. Kimball*, 10 Allen, 211; *Shipman v. Clark*, 4 Denio, 446; per Bronson, Ch. J.

² 20 Barb. 350, Johnson, J., dissenting; *Stimpson v. Reynolds*, 14 Barb. 506, *contra*.

* In *Willard v. Kimball*, *supra*, Metcalf, J., in delivering the opinion, stated the case thus: "The papers show the facts alleged in the defendant's answer to be true; that a writ of replevin, in due form of law, was put into the deputy's hands, sued out by the persons named in the answer, against William A. Knowles, in whose possession the coal then was, and that the deputy served that writ, in all particulars, in the manner prescribed by law, taking the coal from the possession of Knowles. This shows a justification of the deputy in serving the writ. Neither he personally, nor the defendant, whose deputy he is, can be held liable in damages to this plaintiff for that service, even though it could be proved that the plaintiffs in that action of replevin, had no rightful claim to the coal, and that this plaintiff was the sole owner of it. The deputy did what his precept commanded him to do, and nothing more. What the result of that action of replevin was we are not informed, and need not know; whether it is still undecided, or whether judgment has been rendered for the defendant in replevin. There can be no pretence, we think, that the failure of a plaintiff in replevin to maintain his action, renders the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property."

Whether an officer would be liable to the true owner of goods, if, on a writ of replevin commanding him to take them from the possession of the defendant in replevin, he should take them from such owner, or from some other person, *quære* (*Willard v. Kimball*, *supra*).

† In *Foster v. Pettibone*, *supra*, Strong, J., who delivered the opinion, re-

In *King v. Orser*,¹ the New York Superior Court decided that, as the officer under the Code can only take the property described in the affidavit of the plaintiff when it is found in the possession of the defendant or his agent, if the property is in the possession of any other person than the defendant, the officer in taking it acts at his peril, and can only free himself from liability as a trespasser by showing that such person was in reality no more than an agent of the defendant; and that if the officer failed in this proof, he was just as liable for the value of the property to the person from whose possession it was wrongfully taken as he was to the true owner of goods which were levied on and sold under an execution against another. And in Ohio, it has been held that where property is taken by an officer by virtue of a writ of replevin from the possession of a third person, who is the *bona fide* owner thereof, the officer will be liable, although the property taken be the same that is described in the writ.²

§ 467. Where an execution, regular upon its face, is issued upon a judgment rendered by a court having jurisdiction of the subject-matter, the officer is under no obligation to inquire into the regularity of the service of the original writ.³ * He may justify by producing the execution

marked that "it was a consideration entitled to no small weight against the right of action, that as often as property had been seized under a writ of replevin issued therefor, which belonged to or was claimed by some other person than the parties, no case could be found in which a recovery against the officer who served the writ as a wrong-doer had been permitted; that the fact was a striking testimony to the prevalence of an opinion among the profession ever since the action of replevin had existed, that no liability was incurred by the officer by acts done by him in obedience to the process."

¹ 4 Duer, 431.

² *State v. Jennings*, 14 Ohio, N. S. 73.

³ *Smith v. Bowker*, 1 Mass. 76; *Averett v. Thompson*, 15 Ala. 678; *Wilton Manf. Co. v. Butler*, 34 Maine, 431.

* *Smith v. Bowker*, *supra*, was an action of trespass against a deputy sheriff, for taking and selling cows of the plaintiff, by virtue of an execution on a judgment against the plaintiff in an attachment suit. It was contended by the present plaintiff, that the defendant was a trespasser, for the reason that the writ of attachment was against Smith, of Orange, in the county of Hampshire, whereas it should have been against Smith, of Athol, in the county of Worcester. But it was held that the defendant was entitled to judgment. Strong, J., said: "The question is, whether the defendant was bound to inquire as to the service

under which he acted, without proving the judgment. But when he sees fit to go beyond the process, or when, for any other reason, it becomes necessary for him to prove a judgment, he cannot do so without pleading it.¹ Any other person claiming the benefit of the official acts of the officer, must prove the judgment. And the officer must do the same when he is asserting a quasi title by virtue of the levy as against any other than the judgment debtor.² * If the execution be

of the original writ. He certainly was not. The officer is not holden to look beyond his execution. It might, perhaps, be a question whether the judgment rendered, as that was, on default, might not be reversed; but with that question the officer has nothing to do. I have never known a question like this, except in cases of writs of error. I think that the defendant in the original action could take advantage of the mistake in the writ only by pleading in abatement. Be that as it may, I am clear that the present defendant has legally executed his writ, and that he is therefore, upon the state of facts submitted, entitled to judgment."

The levy of an execution upon the property of a corporation where, in the judgment and execution, the corporation is styled differently from the name given it by its charter, will not constitute a trespass (*Wilton Manf. Co. v. Butler*, 34 Maine, 431).

¹ *Dennis v. Snell*, 54 Barb. 411; *Shaw v. Davis*, 55 Ib. 389.

² *Mower v. Stickney*, 5 Min. 397.

* The decision in *High v. Wilson*, 2 Johns. 46, and in the several cases in the English courts which preceded it, went no further than to require the production of the judgment in a suit with a stranger who showed in himself a title to the property which was good as against the defendant in the execution. In *Lake v. Billers*, 1 Ld. Raymond, 733; *Martyn v. Podger*, 5 Burr. R. 2631; *Ackworth v. Kempe*, 1 Doug. R. 41, and in the case of *High v. Wilson*, before referred to, the plaintiffs showed title in themselves derived from the defendant in the execution before the lien of the execution attached thereon. The execution of itself, therefore, was no defense to the officer, who could only make it available against a stranger to it by connecting it with a judgment, and then showing that the transfer of the property to the person thus claiming it was fraudulent and void as against the creditor who had recovered such judgment. In this view of the subject, the cases referred to may be sustained upon principle, as the production of the judgment record was necessary to establish the fact that the execution issued upon a judgment rendered for a cause of action which existed, or for a debt contracted before the issuing of such execution, otherwise there would have been no creditor as against whom the transfer of the property could have been fraudulent. But there are many cases in which it has been held, that where the officer has levied upon property in the possession of the defendant in the execution, and it has been subsequently taken from him by a stranger, he may sustain an action against such stranger upon his title and possession under the execution alone, without producing the judgment to show that the execution had regularly issued (the Chancellor, delivering opinion in *Parker v. Walrod*, 16 Wend. 514):

In trespass against an execution creditor and the bailiff of a county court for seizing goods on behalf of a judgment creditor, the plaintiff put in the warrant of execution, with the indorsement thereon by the officer that he had taken the goods under it. It was held that the bailiff, as well as the execution creditor, was bound to prove the judgment, and that the warrant reciting the judgment

voidable only, and not void, it will protect both the officer and the party at whose instance it is issued.¹ And although it is satisfied in fact, yet if it is unsatisfied on its face, and the officer has no notice of the satisfaction, he will not be liable as a trespasser for acting under it.² Where a deputy sheriff acting under a void commission, levied on goods, and the goods were sold by him, it was held, in an action against the sheriff, that he was protected by the execution.³

§ 468. Where a judgment debtor exhibits to the officer, who has an execution against him, a receipt, and offers to prove by a witness the settlement of the debt, the officer is not bound to investigate the genuineness or sufficiency of the receipt.⁴ Within this principle, where an officer had an execution to collect, which issued on a judgment rendered for the amount of a note duly negotiated, it was held that he was not a trespasser for proceeding to collect the same, after the debtor had procured and shown him a discharge from the nominal plaintiff, the assignor, and forbidden his thus proceeding.⁵ * So, likewise, an officer will be protected who pro-

(though put in by the plaintiff) was no evidence of such judgment (*White v. Morris*, 2 J. Scott, 1015).

¹ *Nichols v. Thomas*, 4 Mass. 232; *Sandford v. Nichols*, 13 Ib. 286; *Cogburn v. Spence*, 15 Ala. 549; *Wilmarth v. Burt*, 7 Metc. 257; *Batchelder v. Currier*, 45 N. Hamp. 460.

² *Thrower v. Vaughan*, 1 Richardson, 18.

³ *Crockett v. Lattimer*, 1 Humph. 272.

⁴ *Twitchell v. Shaw*, 10 Cush. 46; *Wilmarth v. Burt*, 7 Metc. 257.

⁵ *Lampson v. Fletcher*, 1 Vt. 168; *ante*, § 336.

* In this case, it was said: "The court are equally disposed to protect the *bona fide* assignee of a note in his right of action, if any such right exists upon the note, and the right of the signer of the note to make any defense that exists before he has notice of the assignment. But we think that each must attend to his rights in proper season, and not by letting the proper season go by neglected, so pursue his rights afterwards as unnecessarily to embarrass the rights of the other party, and more especially, the rights of a public officer. In this case, when the note was sued, the defendant Lampson ought to have made his defense, whether it were an offset or discharge from Jennison, before judgment against him. The suit was then under the care of Austin, the assignee, and he would have had opportunity to meet this defense, and show it unjust, if he could. But Lampson, instead of preferring his defense where Austin could know and meet it, takes his judgment in his action against Jennison, of which action Austin was probably ignorant; if not, he had no right to appear in it; and while Austin's execution is in the hands of the sheriff, he procures a discharge from Jennison, by offsetting judgments, and shows this discharge to the sheriff, and

ceeds in good faith to serve an execution after being told by the defendant that an appeal has been taken.¹

§ 469. Where an officer acts officiously and as a volunteer, it is incumbent upon him to show that the process was legal and sufficient.² * If he is engaged in a conspiracy, the writ,

forbids his proceeding with the execution, while Austin, whose ownership was known to Lampson long before his suit upon the note, asserts his right to control the execution, and directs the sheriff to proceed. He follows the direction of Austin and levies upon a wagon of Lampson, for which he brought his action of trespass. Under these circumstances, the sheriff did right in obeying Austin. Lampson had neglected his defense till the note had passed into a judgment, which warranted the execution, which was *prima facie* a good authority to take the wagon. Lampson had no right to stop the course of this execution by a discharge merely from Jennison, who, as Lampson knew, had conveyed the note to Austin. If he would stop the progress of the execution in this stage of it, he must resort to his *audita querela*, in which the merits of his claim may be tried, and his bonds to prosecute will keep good and safe the rights of Austin while the matter is in litigation. In the course taken by Lampson, Fletcher must either obey or disobey a regular and legal execution, at the peril of deciding correctly a dispute between Austin and Lampson about the defense which Lampson had, but did not make, to the note assigned to Austin. If he decided this point wrong, and obeyed the process, Lampson treats him as a trespasser. If he decided the same point wrong and disobeyed the process, Austin has his action in the name of Jennison for such neglect. It will not do to sanction a course which necessarily places a sheriff in such a dilemma. When a discharge is shown to a sheriff from a person who is the owner of the debt, and the sheriff knows him to be the owner, and has no doubt about the fairness of the discharge, if the sheriff should proceed with the execution regardless of such discharge, he would probably be considered a trespasser. But he must not be so considered in the present case. He was not obliged to take the responsibility of disobeying both the directions of Austin, who gave him the execution, and the precept of the execution itself."

¹ Foster v. Wiley, 27 Mich. 244.

² Hunt v. Ballew, 9 B. Mon. 390.

* Stoughton v. Mott (15 Vt. 162) was an action of trespass for seizing and conveying away a sloop laden with arms and munitions of war. The defendant justified under an act of Congress which provided for the seizing of vessels and arms prepared for expeditions against conterminous territory of foreign nations with whom the United States were at peace. On the trial in the County Court, a question arose as to what should be deemed the frontier. The judge instructed the jury that it was the boundary line between the United States and the province of Canada; and that unless the evidence satisfied them that the sloop was to be conveyed beyond the line and into the province of Canada, the defendant had no authority to seize and detain the vessel. The Supreme Court said: "The term 'frontier' embraces a tract of country, of a greater or less width, bordering on, and contiguous to, the line; and though both the act of Congress and the plea speak of the vessel as about to pass the frontier for a place within a foreign State or colony, yet we do not consider it necessary, in order to justify the officers therein mentioned in seizing and detaining a vessel, that the vessel should actually be about to pass the boundary line. Indeed, such a construction would render the act wholly insufficient and inoperative. It cannot be, that a vessel, with arms and munitions, might approach the extreme verge of the frontier, close to the line, where, as the evidence tends to prove, all the arms, ammunition and munitions of war could be taken therefrom, and used with the consent of the owner in forwarding and carrying on military operations within the territory of

though regular on its face, issued by a court of competent jurisdiction and regularly returned, will afford him no protection.¹ It is his duty to refrain from executing process when notified that it has been superseded; and if he do not, he will become a trespasser.² *Hickok v. Coates*³ was an action of trespass for carrying away personal property belonging to the plaintiff. The plea alleged that the defendant, as sheriff, had levied on the property in question, and that the plaintiff, knowing that fact, had improperly obtained possession of it; and that the defendant peaceably retook the property, in order to execute the writ by virtue of which he had levied. The replication did not deny the levy, but averred that, after the levy, the plaintiff in the execution ordered the defendant (the sheriff) to suspend further proceedings, he, the plaintiff in the execution, with whom the property was left, having sold it to the plaintiff in this suit for a valuable consideration. It was held that, as the plaintiff in the execution, in consequence of the directions given by him to the defendant (the sheriff), lost his lien upon the property, the replication was good in substance.*

a foreign power, with whom the United States were at peace, and no officer of the United States be justified in interfering. We think that the officers mentioned in the act of Congress were authorized and justified by that act in seizing and detaining any vessel having on board arms or munitions of war sailing in the frontier and near to the boundary line, and in a direction to the foreign province, if they had probable cause to believe, and did believe, either from the character of the vessel, or the quantity of arms and munitions on board, or other circumstances, that either the vessel or the munitions of war were intended to be employed, either by the owner or any other person with his privity, in carrying on any military expedition or operations within the territory of a foreign power. As the decision of the court made the justification of the defendants to depend wholly on the fact whether the vessel was about to pass the boundary line of the United States into the province of Canada, the decision was erroneous, and must be reversed."

¹ *Slomer v. People*, 25 Ill. 70.

² *Morrison v. Wright*, 7 Port. 67.

³ 2 Wend. 419.

* An officer who has attached personal property and delivered it to a receptor, may take it from the owner, who has been allowed to retain it by the receptor. *Bond v. Padelford* (13 Mass. 394), was an action of trespass against a deputy sheriff for taking and carrying away cattle. It appeared that the defendant, having attached the cattle, without removing them, took an accountable receipt for them from one Flagg, and that the defendant afterwards took the cattle out of the plaintiff's possession. Counsel for plaintiff contended that the defendant, by taking a receipt for the cattle, waived his special property in them. The court, in nonsuiting the plaintiff, said: "This action is conceived on mistaken principles. The present plaintiff had no interest in the agreement made between the defendant and Flagg. He had no right to the custody or use of the cattle

5. *Duty and liability of officer in seizing goods.*

§ 470. At common law, when personal tangible property is seized by virtue of an execution, it forthwith vests in the sheriff, and the plaintiff in the execution cannot meddle with it.* If it is taken away, none but the sheriff can retake it, or, by action recover it or the value of it. The property when once levied upon, is in the custody of the law, and the sheriff is bound to preserve it against all the world for the purpose of satisfying the judgment. To him alone can the plaintiff look for the application of it to this purpose.¹ Where an officer leaves property levied on in the hands of the debtor in the execution, the officer becomes as to the creditor the insurer of the property against its loss.²

§ 471. It is the duty of an officer having an attachment, to whom goods of the debtor are shown, to seize them, take them into his custody, and keep them under his control, so that he may have them to answer any judgment which the plaintiff in the suit may recover. If the officer chooses to deliver them into the hands of a third person on his receipt and promise to have them forthcoming, still, the law considers the goods in the hands of the officer, and such third person is but his servant. The officer ought to perform this

after they were attached. He held them merely by the indulgence and at the pleasure of the officer, or Flagg, who can be considered in this transaction in no other character than as the servant of the officer. Flagg could have maintained no action for the cattle in his own name. But he might lawfully, at any time, have taken them out of Bond's possession, notwithstanding any contract between him and the officer. So might the officer, although he had made a return of the writ. The special property remained in him, and he had a complete right to the possession; and his exercising that right was no injury to Bond."

The taking of property attached from the possession of the officer who made the attachment, by one who had no authority to seize it, is not within the reason which may excuse the non-production on the ground of inevitable accident. It might be very mischievous to hold that this furnished any excuse, except it should be for delay until the sheriff could pursue the trespasser to judgment (*Lovell v. Sabin*, 15 N. Hamp. 29).

¹ *Skinner v. Stuart*, 39 Barb. 206.

² *Browning v. Hanford*, 5 Denio, 586. The chancellor, *contra*; s. p. 5 Hill, 588, per Cowen, J.; s. c. 7 Ib. 120.

* A purchaser at an execution sale, who takes possession of the property purchased against the command of the officer, is a trespasser, though he be the plaintiff in the execution (*Garner v. Willis*, Breese, 290).

duty openly and fairly, that a debtor attentive to his affairs may not be deprived by him of any opportunity which his situation affords to prevent expense and the waste and destruction of his property.¹ The officer in the discharge of his duty on occasions of this kind must be allowed the exercise of some discretion, and is not to be made liable for every trivial mistake in judgment he may make in doubtful cases. But the discretion allowed him must be a sound discretion, exercised with perfect good faith, and with an intent to subserve the interests of both the debtor and the creditor.* If he seize property beyond the limits of his territorial jurisdiction, he will be liable in trespass to the owner.²

§ 472. An officer is not bound to attach and take possession of property already under attachment, unless it is sufficient to pay the debt secured by the previous attachment; and if he do so, he will be deemed a trespasser.³ Where, however, a receiptor of property attached, has permitted the debtor to hold and use it as owner, the attachment is regarded as dissolved so far that the property may be attached by another officer who has no notice that there is a prior attachment still subsisting.⁴† But if the officer know that

¹ Barrett v. White, 3 N. Hamp. 210.

² Parmlee v. Leonard, 9 Iowa, 131.

³ West River Bank v. Gorham, 38 Vt. 649.

⁴ Robinson v. Mansfield, 13 Pick. 139; Denny v. Willard, 11 Ib. 519.

* It being the interest of both the debtor and the creditor, that property attached should be preserved and not be wasted, some arrangement has in general been made to prevent the damage which hay and grain in the straw must sustain by a removal. Either some person has been found in whose custody it could be left, or who was willing to become responsible for the delivery of it when demanded; or it has been in some other way secured in the place where attached. It is believed to have been very rare that hay or grain in the sheaf, has been removed from a barn; and when it has been, it was only when small quantities were attached. In this way creditors have been enabled to seize this sort of property to secure their debts without any material injury to the debtor. There is a close analogy between attachments upon mesne process and a distress at common law to compel an appearance or the performance of a duty. In England the common law was altered on the subject of distress by the statute of 2 W. & M. ch. 5, which enacted that any person having rent in arrear, on a demise, might seize sheaves or shocks of corn, or corn in the straw or loose, or hay in a barn, granary, or upon a hovel, stack or rick, or otherwise, upon any part of the land charged with such rent, and lock up and detain the same in the place where found, so as such corn be not removed to the prejudice of the owner (Bacon's Abr. Distress, D.; Co. Litt. 47, a, b; 3 Bl. Com. 9, 10).

† Where A., a deputy sheriff, attached a horse as the property of another,

there is a subsisting attachment and an unrestricted contract of bailment, he cannot acquire a lien by attaching it, although the debtor at the time have the possession of the property.¹ One who buys personal property at a public judicial sale, may leave it with the defendant in the execution without making it liable to be taken under another execution. It must be left, however, under such a contract of bailment as would in law protect it from the bailee's creditors the same as if he had never been the owner of it. It may be hired or loaned with safety. But if it be sold or given, the purchaser parts with his title, and cannot maintain trespass against anybody for taking it.²

and left it with the owner who claimed the horse, but agreed to redeliver it to the officer, and afterward B., another deputy sheriff, with process against the same debtor, attached the horse and carried it away, and while the horse was in B.'s possession A. seized it and sold it on his execution; it was held in an action of trespass by B. against A. that the plaintiff was entitled to recover the value of the horse, *Fisher v. Cobb*, 6 Vt. 622, Rbyce, J., dissenting as to the right of the plaintiff to recover the value of the property.

Where an officer after attaching personal property neglects to perfect his lien created by his attachment, and it is afterward taken from his custody by another officer under a second writ of attachment against the same debtor, and the property is sold by the second officer under an execution obtained in the second suit, and the avails applied thereon, the first officer can recover only nominal damages against the second officer for such taking (*Goodrich v. Church*, 20 Vt. 187).

Where an officer upon attaching personal property places it in charge of a person and takes his receipt for it, and the latter transfers the property to another, who gives the receptor a bond to indemnify him against the receipt, the officer may take the property out of the transferee's hands at any time during the pendency of the attachment (*Briggs v. Mason*, 31 Vt. 433).

Where a bailee of goods which are attached, gives a receipt for them promising to redeliver them to the officer on demand, and afterwards appropriates the goods to his own use, he may show in an action of trespass brought against him by the debtor, that the goods were his own property (*Barron v. Cobleigh*, 11 N. Hamp. 557). It is somewhat difficult to reconcile with the foregoing the case of *Bursley v. Hamilton*, 15 Pick. 40. There the defendant gave a receipt for articles attached, promising to redeliver them on demand. In an action on the contract it was proved that the property attached belonged to the defendant and not to the debtor; but it was said by Shaw, C. J., that, "in an action to enforce the promise, he is precluded from alleging property in himself by way of defense."

A sheriff having levied upon goods, left them in the custody of a third person, under an agreement under seal that they should be redelivered at a certain time and place, and on failure thereof that such person should confess judgment for the amount of the debt and costs in the suit, and the cost of the writ. It was held that the sheriff had not such a possession of the goods as would entitle him to maintain trespass against the defendant in the execution for taking them away (*Lewis v. Carsaw*, 15 Penn. St. R. 31).

¹ *Young v. Walker*, 12 N. H. 502; *Whitney v. Farwell*, 10 Ib. 9; *Carpenter v. Cummings*, 40 Ib. 158.

² *Dick v. Cooper*, 12 Harris, 217.

§ 473. An officer may become liable, even where he acts in perfect good faith. If, for instance, he seize the goods of A. under a writ against him, and it subsequently appears that they were exempt, it will be no justification that the property belonged to A. The direction to attach always includes the idea of attachable property, and the officer takes it at his peril in this respect; and if it prove not to have been attachable, he is a trespasser.¹ The mere silence of the party would furnish no excuse.² Ignorance of the officer would not be a defense; but proof of knowledge on his part that the goods were exempt would be a strong circumstance in aggravation.³* Where, however, the law exempts certain articles to be selected by the owner from seizure and sale on execution, an action of trespass cannot be maintained against the officer for selling them, unless the plaintiff show that at the time of the levy, or within a short time thereafter, he selected the articles, and gave the officer notice that he had done so.⁴†

¹ Gibson v. Jenney, 15 Mass. 205; Howard v. Williams, 2 Pick. 80; Foss v. Stewart, 14 Maine, 312; Beau v. Hubbard, 4 Cush. 85; Brown v. Wait, 19 Pick. 470; Deyo v. Jennison, 10 Allen, 410; Buckingham v. Billings, 13 Mass. 82; Hoyt v. Van Alstyne, 15 Barb. 568; Dow v. Smith, 7 Vt. 465; Crocker v. Spencer, 2 D. Chipman, 68; Leavitt v. Metcalf, 2 Vt. 342; Kilburn v. Deming, Ib. 404; Spooner v. Fletcher, 3 Ib. 133; Fry v. Canfield, 4 Ib. 9; Haskill v. Andros, Ib. 609; Hart v. Hyde, 5 Ib. 328; Leavitt v. Holbrook, Ib. 405.

² Frost v. Mott, 34 N. Y. R. 253.

³ Lynd v. Pickett, 7 Minn. 184.

⁴ Frost v. Shaw, 3 Ohio, N. S. 270.

* In has been held, in North Carolina, that an officer who seizes, under execution, privileged articles, such as arms for muster, does not thereby become a trespasser, unless he seizes them knowing that they are privileged (The State v. Morgan, 3 Iredell, 186).

† In New Jersey it has been held that an officer may seize and hold goods under an attachment or execution until he can inventory and appraise them, although the goods are exempt from execution (Bonnell v. Dunn, 5 Dutch. N. J. R. 435).

In an action against a sheriff for levying upon property exempt from execution, the *onus probandi* to show that the property is exempt rests on the plaintiff (Carnrick v. Myers, 14 Barb. 9).

It is not competent for the defendant to prove that the goods were mortgaged by the plaintiff without consideration and in order to defraud his creditors. If the goods were exempt from attachment for the plaintiff's debts, he did no wrong to creditors by mortgaging them without consideration or otherwise, such a mortgage not being fraudulent, and not rendering goods liable to attachment which were not so otherwise (Bean v. Hubbard, 4 Cush. 85).

Trespass is the proper form of action at common law for seizing goods, by virtue of an attachment, which are exempt. But now, in Massachusetts, under

§ 474. An officer is not authorized by virtue of a precept against one person to take and sell the property of another. He must ascertain at his own risk that the property to be taken and sold is the property of the person against whom he has a precept. And he is not, in doubtful cases, obliged to take it without a full indemnity. The owner of property against whom he has no precept is not obliged to notify him before he will be entitled to maintain an action, unless the owner has so conducted with his own property as to forfeit his legal rights;¹ and it makes no difference that the plaintiff in the execution assured the officer that they were the defendant's goods.² In trespass by J. J., the elder, against the sheriff and H., the sheriff justified under a *fi. fa.* issued against the goods of the plaintiff by H. Replication that the *fi. fa.* did not issue against the goods of the plaintiff. H. had obtained judgment against another J. J., who was the son of the plaintiff, and thereupon issued a *fi. fa.* against J. J., without any further description, under which the goods of J. J., the elder, were taken. It was held that the plea

the statute of 1839, ch. 151, § 4, trover will equally well lie (*Devlin v. Stone*, 4 Cush. 359).

There may be cases where the taking of property exempted by law would furnish no ground for an action of trespass, and where a license to attach and a subsequent attachment in pursuance of that license would not only justify the officer in attaching the goods, but also, in selling them afterwards, notwithstanding the debtor might attempt to countermand the permission to attach after it was executed, and to regain the possession of the goods.

Rice v. Chase, 9 N. Hamp. 178, was an action of trespass against a deputy sheriff for attaching certain articles of household furniture, which were exempt by law from seizure. It was admitted that at the time of the taking it was clearly an act of trespass; and the question was, whether the subsequent declarations of the plaintiff, made to a third person and offered to be proved in the case, could be given in evidence to change the character of the act from a trespass to a justifiable taking, or operate as a waiver of the right then vested in the plaintiff to maintain an action for such taking. The court, per Parker, C. J., said: "The answer is plain. A mere loose declaration, made to a third person, without any consideration paid by the creditor or officer, and without any knowledge on their part at the time that such a declaration had been made, cannot be construed to deprive the plaintiff of a right of action which had previously accrued to him for the trespass" (citing *Tufts v. Hayes*, 5 N. Hamp. 452).

¹ *Lothrop v. Arnold*, 25 Maine, 136; *Rogers v. Weir*, 34 N. Y. 463; *Saunderson v. Baker*, 2 W. Black. 832; *Ackworth v. Kempe*, Doug. 40; *Samuel v. Duke*, 3 Mees. & Wels. 622; *Angell v. Keith*, 24 Vt. 371.

² *Bac. Abr. N. S.*; *Roberts v. Thomas*, 6 T. R. 88.

was disproved, and that the writ afforded no justification to the sheriff.¹ *

¹ Jarman v. Harper, 6 Man. & G. 827.

* It was also held that H. was liable in trespass, notwithstanding he had not in any way interfered beyond giving instructions to the attorney to sue his debtor, J. J., the son.

Where an officer, having separate executions against a father and son, levied on three horses belonging to the son as the property of the father, and the son, before the day of sale, offered to pay the execution against him, but the officer refused to accept payment, and sold the horses, it was held that the officer became a trespasser *ab initio* (Parish v. Wilhelm, 63 N. C. 50).

In California, it has been held that before an officer can be made liable for seizing the goods of a third person under an attachment, he is entitled to notice of the claim of such third person and a demand of the goods; that a conversation between the claimant and the officer's bailee is not a sufficient notice; and that the officer's right to notice is not affected by the fact that he had obtained indemnity before seizing the goods (Taylor v. Seymour, 6 Cal. 512).

There is no difference in the law applicable to the levy of an execution on property exempt from such levy, and a levy on the property of a third person not the execution debtor (Williams v. Miller, 16 Conn. 143).

An inquisition taken by an officer is not a justification to him in an action of trespass for taking the goods of the plaintiff, but can only go in mitigation of damages (Townsend v. Phillips, 10 Johns. 98). The authorities referred to in Bayley v. Bates, 8 Johns. 185, support this view, and make a distinction between an action against the sheriff for taking goods not belonging to the defendant in the execution, and an action against him by the party in the execution for returning *nulla bona* upon the strength of such an inquisition. It may, in many cases, justify him upon a charge for a false return for omitting to act; but not, in the other case, for actually seizing goods not belonging to the party against whom he was to proceed.

Where goods seized under the New York absconding debtor act are claimed by a third person, if the sheriff, notwithstanding the finding in favor of the claimant, detain the goods without taking a bond of indemnity, he cannot be charged with anything beyond an act falling within the ordinary execution of his duty; and if it should turn out, ultimately, that the goods belonged to the claimant, it will not lay the foundation for damages beyond the value of the property (Batchellor v. Schuyler, 3 Hill, 386). The statute alluded to in this case provides that if goods seized under the absconding debtor act are claimed by a third person as his property, the sheriff shall summon a jury to try the validity of the claim, "in the same manner and with the like effect as in case of seizure under execution." If the jury find in favor of the claimant, the goods are to be forthwith delivered to him or his agent, unless a bond be given by the attaching creditor to indemnify the sheriff for the detention of the goods. In case of such indemnity, the sheriff is bound to keep the goods in his possession (N. Y. Rev. Sts. 5th ed. vol. 3, p. 80, sects. 10 & 11). From the language of the foregoing statute, it might seem that the sheriff was bound to redeliver the property after inquisition found in favor of the claimant, unless a bond of indemnity were tendered. The court, in the above case, per Nelson, Ch. J., said: "The preliminary inquiry before the jury is not conclusive upon the parties, and if the sheriff, as in case of an execution, chooses to take the risk of showing, in a suit by the claimant, that the property belongs to the debtor, I see no objection to the seizure and detention without the indemnity. If the bond were intended for the benefit of the claimant, and not of the sheriff, it might be otherwise; but the former has no interest in it. It is a bond of indemnity only, intended exclusively for the security of the officer, and with which the claimant has no concern."

If a marshal, under an execution of a United States court, seizes the goods

§ 475. An exception to the foregoing rule has been made when the owner of the goods has allowed the judgment debtor to exercise acts of ownership over them; in which case, an action of trespass against the officer has not been sustained without proof of notice, or a demand upon him for restitution; ¹ * unless it be shown that some actual damage

of a third person, he may be sued therefor in the courts of the State (*Hanna v. Steinberger*, 6 Blackf. 520).

¹ *Vose v. Stickney*, 8 Minn. 75.

* *Moore v. Bowman*, 47 N. H. 494, was an action of trespass against an officer, for attaching the plaintiff's mare, on a writ against a third person, the mare being at the time in the debtor's stable, and seized by the officer with another horse belonging to the debtor. The jury having found a verdict for the plaintiff for the value of the horse, and interest from the taking, together with exemplary damages, the Supreme Court directed judgment to be entered thereon, upon the plaintiff's remitting the exemplary damages. The court said: "If the horses were accidentally placed in the stable, without fraud on the part of the plaintiff, and the defendant selected two as the horses of the debtor, and attached them, intending to hold them at all events, and not temporarily till he could get further information, and he insisted upon holding them after notice that one of them belonged to the plaintiff, he would be liable in trespass if the horse belonged to the plaintiff, and he was not estopped to claim it by some fraudulent act on his part. Had the plaintiff's and the debtor's horses been intermingled so that the officer, using due diligence, could not distinguish them, he might perhaps take all and hold them until there was an opportunity to identify them. But his right to take possession and hold the plaintiff's horse would be limited by the occasion for it, and if, instead of taking it for the lawful purpose, he took it for the purpose of holding it at all events, he would be liable in trespass. But it is urged that the two horses were so placed by the fault and negligence of the plaintiff, and that, as the defendant was thereby misled, the taking was not unlawful. Had they been accidentally placed in adjoining stalls, it is quite clear that this would give the defendant no right to attach the plaintiff's horse as the property of the debtor, any more than to sell it as such. He might have taken and detained the three horses a reasonable time till he could make inquiries, and ascertain which belonged to Moore. But if, instead of that, upon the knowledge he already had, he selected these two, and attached them, with a determination to hold them at all events, he would be liable to the plaintiff in this form of action, and could not justify the taking upon the ground of mistake, any more than if he had taken the plaintiff's horse alone. He would have power to detain the whole until he could make inquiry. But if he did not take and detain them for that purpose, he had no right to take the plaintiff's horse at all. This would be illustrated by the supposition that he took the plaintiff's horse upon the ground that his title was derived from the debtor, and that the sale was fraudulent as to the creditor. The language of some of the cases would seem to imply that if the goods were so intermingled that the officer could not select those of the debtor, he might, without notice to the other party, attach and hold the whole until those of the other party were designated and claimed by him. Upon such views, the officer might have taken all the horses in the stable where he found these, and held them until identified by their owners. Such a doctrine, we think, cannot be supported. It is not necessary, to enable the sheriff properly to execute his precept. If, as in this case, he wishes to attach two out of many horses in the same stable, he is bound to make * reasonable efforts and inquiries, in order to ascertain what horses belong to the debtor. If the various owners and the debtor are at hand, he would ordinarily

has accrued to the owner of the goods, and that he has been prevented, by the act of the officer, from recovering possession of them.¹ A further exception to the liability of the officer would arise in case of acquiescence on the part of the owner of the goods in their seizure and sale. In *Fiero v. Betts & Hubbell*,² Betts was an officer, and Hubbell, the plaintiff in an execution against one Clow, under which goods owned jointly by Fiero and Clow were sold. As to Betts, it appeared that Fiero was present at the sale and bid on a part of the property sold, and purchased some of the property through an agent. There was no evidence that he claimed at the sale any interest in the property sold, or that he forbade the sale of any part of it, or that any objection was made by him to the sale; and it appeared that Betts, at the commencement of the sale, declared that he sold only the right and title of Clow to the property. It was held that the questions, whether the plaintiff consented to the sale, and whether Betts sold only the right of Clow in the property, should have been submitted to the jury; and that if Fiero either assented to, or acquiesced in the sale, or if Betts only sold Clow's interest in the property, trespass could not be maintained against him. So likewise, where one of several administrators was present at a levy upon the goods of his intestate, and furnished to the officer making the levy a list of the articles, and was present at the sale and made statements to the bidders, it was held that he and the other administrators could not proceed against the officer as a trespasser.³ If, however, the goods were seized under an attachment, the action may be maintained, notwithstanding the

inquire of them; although, to guard against interference, he might, while making such inquiries, detain in the stable such horses as he had reason to suppose might prove to be those he sought. This power, we think, is all that is necessary, and is the view that best accords with the adjudged cases. Nor do we think that the rule is otherwise where the goods are carelessly or negligently intermingled, but without fraud."

¹ *Tancred v. Allgood*, 4 H. & N. 438; 23 L. J. Exch. 362.

² 2 Barb. 633.

³ *Camp v. Moseley*, 2 Florida, 171; *Ponder v. Moseley*, *Ib.* 207; but see *Rogers v. Fales*, 5 Penn. St. R. 154.

owner came in and filed his claim to the property, and recovered judgment for its restitution.¹

§ 476. Where property of the wife is seized under an execution against her husband, the officer is liable to her in damages for such illegal seizure.² The question most likely to arise in such case will be, as to the wife's right to the goods as her separate estate. *Bruce and Wife v. Thompson*,³ was an action of trespass to recover the value of property sold by the defendant as an officer upon execution, for the sole debt of the husband, the property being the annual products of the wife's land in his possession, and carried on at the expense of the husband. The parties, before their intermarriage, made, in contemplation of such an event, what they considered a marriage settlement, which was a stipulation between themselves merely, and without the intervention of trustees, that the wife should enjoy her separate property without interference on the part of the husband. It was claimed that the marriage settlement, as it was called, was sufficient to exempt the annual crops of the wife's land from attachment and levy of execution on the husband's debt. It was held that such a contract, executed without the intervention of trustees, being incomplete, would not, at law certainly, have that effect; that, at most, it was but an agreement to make a suitable marriage settlement, and the parties beneficially interested, whether the wife or children, might, on application to a court of equity, compel the execution of such a settlement as the court should deem reasonable, which would then be effective to protect the property at law.* But in Connecticut, where, in trespass against a deputy

¹ *Trieber v. Blocher*, 10 Md. 14.

² *Mock v. Kennedy*, 14 La. An. 32.

³ 26 Vt. 741.

* The statute referred to in *Bruce v. Thompson*, *supra*, was as follows: "The rents, issues and profits of the real estate of any married woman, and the interest of the husband in her right in any real estate, shall, during coverture, be exempt from attachment, or levy of execution, for the sole debt of the husband, and no conveyance, by such husband, of such rents, issues and profits, &c., shall be valid, unless by deed of husband and wife." The court, per Redfield, Ch. J., said: "In regard to the effect of the statute, which is similar to those of some of the other American States, there seems to have been, to some extent, a popular impression

sheriff for the wrongful taking and carrying away of a horse wagon and harness, claimed by the plaintiff to be held by him as trustee for his wife, the plaintiff proved that he and his wife were married in England, and that, at the time of their marriage, it was agreed between them that whatever personal property she had should remain hers; that, after marriage, they both treated it as hers; that they subsequently removed to Connecticut; that he had at all times allowed her to have the exclusive control of it; and that with some of the avails she had bought the horse and wagon in question; it was held that the jury might properly find that the equitable title to the property was in the wife.¹ And in the same State, where a husband allowed his wife to sell certain personal property, the legal title to which was in him, to vest the avails in bank stock in her own name, and take the dividends; and after her death, as her administrator, he sold the stock, and deposited the money in the savings bank to the credit of her estate, it was held that the money so deposited ought to be regarded as part of her estate.²

§ 477. By the common law, the husband, by virtue of the marital relation, succeeded to the ownership of the personal property of the wife, and was authorized to reduce the same to possession, and to retain it. In equity, the wife could maintain an action against her husband for the protection of her property, and to restrain him from its improper use and destruction. He was also liable to account to her for her separate estate received by him without her knowledge; and equity would interpose to protect her in the enjoyment of it.³ Legislation in several States of the Union has, to a great ex-

that it would exempt the annual products of the wife's land from the control of the husband or his creditors. Such was the decision of the court below, and such the impression of one member of this court, at the first argument. But a careful examination of the terms of the statute cannot fail, we think, to convince all, that the words used have no very marked fitness to express the yearly products of land which are the joint results of labor and the use of the land."

¹ *Smith v. Chapell*, 31 Conn. 589.

² *Jennings v. Davis*, *Ibid.* 134.

³ *Clancy's Rights of Married Women*, 35; *Freethy v. Freethy*, 42 Barb. 641; *Devin v. Devin*, 17 How. Pr. R. 514.

tent, divested the husband of the right to the personal property of the wife, and placed it under her direct control. In those States, the cases in the old reports are of little use in the exposition of the existing laws regulating the marital relations and defining the rights of married women.* In New York, where the wife lived with her husband on her own farm, which was carried on in her name, it was held that what was raised thereon, and property taken in exchange therefor, could not be taken by the creditors of the husband.¹† In the same State, in an action by a married woman

¹ Gage v. Dauchy, 34 N. Y. 293.

* In *Whitney v. Whitney* (49 Barb. 319), which came before the court on demurrer to the complaint, it appeared that the plaintiff was the owner of considerable property, most of which consisted of a house and lot, which had been exchanged for another parcel of real estate; that she had sold the house and lot, and that a portion of the avails of the sale, in bank bills, was placed by her, upon retiring to bed at night, in a pocket-book under her pillow, and was taken from there by her husband, the defendant, before she arose the following morning. She asked judgment against the defendant for the amount thus taken. Ingalls, J., who held the special term, the order of which overruling the demurrer was afterward affirmed, said: "The act of 1862 provides a remedy for any violation of the rights of a married woman in respect to her separate property. As the Legislature has thus conferred upon a married woman the right to receive and hold property free from the control of her husband, and the act of 1862 has provided a remedy by which such right is to be protected and enforced, viz., by action in her own name, the same as though sole, I am of opinion that the present action can be maintained by the plaintiff."

† This was an action of trespass for taking, by virtue of an execution, certain personal property, belonging to a married woman, from her farm on which she resided with her husband. At the trial at the circuit, a verdict was found for the plaintiff, which the general term of the Supreme Court set aside. The Court of Appeals, in reversing the judgment of the general term, said: "The act of 1849, in respect to married women, was designed for their safety and protection from the debts and contracts of the husband. It is declared that the rents, issues and profits of her property shall not be subject to the disposal of the husband, nor be liable for his debts, and shall continue her separate property as if she were a single woman. The inquiry is naturally suggested, whether the married woman loses the protection of this statute, if she permits her husband to reside with her upon her own farm, and to work on it at his pleasure, assisting her in making it productive, without any agreement between them as to the ownership of the crops, or as to the compensation for his labor. To my mind, the answer is obvious. The principles of the common law, as expounded by Clancy and Roper, when attempted to be applied to the rents, issues and profits of her estate, or her separate property, are repealed. The demands of the husband's creditors are not to be elevated above the rights of the wife, under this statute. Her property and its income are exempted from that liability in cases free from fraud. The creditor who sells or lends to a man who has not the means of making payment, does so at his own hazard, and he does not thereby make a case for construing this statute with strictness against the married woman. According to the argument of the learned justice who delivered the opinion at the general term of the Supreme Court, if the husband is permitted to reside with his wife, and sells or exchanges any of the property which is the produce of her farm, or the offspring

against a sheriff for wrongfully seizing, on an execution against her husband, a quantity of hay and two cows, which she claimed as her separate property, the court permitted the plaintiff to prove, in order to show that she was the owner of the hay, that the farm was in reality her property at the time the levy was made, and that the deed was given to her husband by mistake. The plaintiff testified that the first knowledge she had of the mistake in the deed was derived from the defendant at the time he made the levy. She then told the defendant that she owned the farm and the hay and cows. After the levy was made, and before the hay and cows were sold, the mistake in the deed was rectified by the husband's conveying the farm to a third person, who reconveyed it to the plaintiff. The jury were instructed to give the defendant the benefit of the labor of the husband of the plaintiff, so far as it increased the value of the hay. The cows were bought on credit. A note was given for them by

of her live stock, without the express authority of the wife, it is to be deemed a gift or dedication to the husband of the articles sold or exchanged. This ruling maintains the ancient doctrine in respect to the personal estate of the wife, which has been permitted voluntarily on her part to come to the possession of her husband. Such a rule can be maintained only upon a narrow and strict construction of the statute. The fault of such a construction is, that it permits the mischief to remain which the statute was designed to remedy. The income and profits of her separate estate are not then free from liability for the debts of her husband. It is urged, as a reason for this rule, that the labor of the husband is entitled to its reward, and that, if the wife were single or unmarried, and the husband had entered upon her land and raised a crop, without any agreement constituting them landlord and tenant, she could not have taken the crop, but would be entitled to recover only for the use and occupation of her land. 'Surely,' says the judge, 'her relation to him as a wife does not confer greater rights than she would have had as a *feme sole*.' The case is speciously presented in this manner. Let us state the fact a little differently. Let a stranger come upon the land where the owner, a *feme sole*, resided, and using her team and implements of husbandry to cultivate her land; would it not be implied that he worked for wages, or that he was the servant or agent of the owner? Surely, with the statute in her favor, her relations to the laborer, as a wife, should not deprive her of the benefit of the same rule. It is not competent for husband and wife to make an agreement between themselves for wages, nor for the renting of the wife's land. It should not be inferred from the want of an agreement of this nature, which cannot be enforced, that the wife consented that her husband should be the owner of the produce of the land, or of the offspring of her live stock. The argument is, that we must imply that the wife consented that the husband should be the owner of the crops, &c., which were the products, in part, of his care and labor. The implication establishes a rule, and effects a result that deprives the wife of the rents, issues and profits of her property, and is subversive of the remedy incorporated in the statute, and re-establishes the former mischief."

the husband of the plaintiff and one Ryan. The plaintiff paid the note; but not until after the defendant had levied on the cows. The court charged the jury that, "If the cows were purchased at the request of the plaintiff, and as her property and for her, she having subsequently paid for the cows, they may have been her separate property, and she was entitled to recover for them." A verdict having been found for the plaintiff, the Supreme Court refused to disturb it.¹

§ 478. If the goods of a person, which are distinguishable, have become intermingled with those of a debtor, without fraud on the part of the owner, an officer, who seizes the whole under process against the debtor, without inquiry, will not be protected. Accordingly, where a debtor drove his sheep into the field of one K., without K.'s consent or knowledge, in order to prevent their being taken on execution, and the officer who had the execution entered into K.'s field and drove away, not only the sheep of the debtor, but some of the sheep of K., it was held that, as the sheep of the debtor had become mixed with the sheep of K., without his fault, the officer was bound at his peril to see that he took no sheep belonging to K., and that, in taking K.'s sheep, he became a trespasser *ab initio*.^{2*} In an action of trespass for taking and carrying away a pair of oxen, it appeared that the oxen were attached with other cattle belonging to the brother of the plaintiff; that the plaintiff did not then claim these oxen, but assisted in acting as keeper of the stock; and that, after

¹ Garrity v. Haynes, 53 Barb. 596.

² Kingsbury v. Pond, 3 N. Hamp. 511. And see Colwill v. Reeves, 2 Camp. 575.

* In Kingsbury v. Pond (*supra*), the court remarked that, if the defendant had requested the plaintiff to point out the sheep which belonged to him, and he had refused, this might have made the plaintiff a party to the attempt to prevent the seizure of the debtor's sheep, and might have altered the case very materially.

Where the attachment of goods which, without the fault of the owner, were mingled with those of the debtor, was rightful and justifiable, it will be for the jury to determine whether the neglect or refusal of the creditor to surrender them on demand made by the owner therefor, and offer by the owner to point them out, and their subsequent sale under the process, made the creditor a trespasser *ab initio* (Taylor v. Jones, 42 N. Hamp. 25).

the expiration of the attachment, and the oxen had become separated from the other cattle, the officer seized them on an execution against the plaintiff's brother. It was held that the action might be maintained against the officer, without special notice to him that the oxen were the plaintiff's property, and without a previous demand.^{1*}

§ 479. But if goods be so intermingled with those of a debtor as not to be distinguishable, no action will lie against the attaching officer without a demand and refusal.² Accordingly, where in an action of trespass for taking sundry articles of personal property which were attached by direction of one Tibbets, it appeared that the goods, when attached, were not only intermingled with those of the debtor Rand, but actually marked with his name, so that in the absence of the plaintiff, and without his identifying and pointing them out, it would seem to have been impossible for the officer or Tibbets to have distinguished them from those of Rand; it was held, that both the officer and Tibbets were justified in attaching and holding the goods as Rand's until the plaintiff claimed and identified, or offered to identify

¹ Stickney v. Davis, 16 Pick. 19.

² Bond v. Ward, 7 Mass. 123; Sawyer v. Merrill, 6 Pick. 478; Lewis v. Whittemore, 5 N. Hamp. 364; Gilman v. Hill, 36 Ib. 311.

* In Treat v. Barber (7 Conn. 274), which was an action of trespass *de bonis asportatis*, for attaching and removing goods which the plaintiff claimed to own by previous purchase from A. T., her father, evidence was introduced by the defendant to show that, if any of the goods attached belonged *bona fide* to the plaintiff, she had mingled them with her father's goods, so that she alone could distinguish them; and that, at the time of the attachment, the defendant requested her to select such goods as belonged to her; but that she refused to make such selection, claiming the whole as her own. It was held that, if the plaintiff fraudulently, and with the intention of frustrating the defendant's attachment, had caused her goods and those of A. T. to be intermingled, so as to be inseparable by the attaching creditor, the defendant might justify the taking of them; but not if the intermingling was casual or accidental, and without any design of covering the goods. The court, per Hosmer, Ch. J., said: "The specific objection is, that the plaintiff would not make the requested discrimination. As a matter of courtesy, if she had admitted that part of the goods were not her property, she ought to have done it; and I think she would be under a moral obligation to do so. But she claimed the whole, and probably thought she had a valid title. The omission to give the requisite information was neither a fraud nor the violation of any obligation by law put upon her. Under the circumstances of the case, the defendants acted at their peril."

and point them out and separate them from those of Rand.¹ In such case the owner of the goods may, after attachment, identify them, give notice to the officer, and demand a redelivery, when they must be given up.² But until the owner makes a demand, and properly distinguishes them, the officer is not in fault, and cannot be deemed a trespasser. In Massachusetts, it has been held that if the owner of the goods informs the officer that divers of the articles are claimed by him, and exhibits to the officer a bill of sale containing articles of the same kind as those attached, the officer will be justified if he select from the whole quantity in his hands enough to correspond with the bill of sale, retaining the most valuable.³ *

¹ Taylor v. Jones, 42 N. Hamp. 25.

² Wellington v. Sedgwick, 12 Cal. 469; Yates v. Wormell, 60 Maine, 495.

³ Shumway v. Rutter, 8 Pick. 443.

* In Parker v. Walrod, 13 Wend. 296, Parker brought an action in a justice's court against Walrod for taking cleaves and whiffletrees belonging to a wagon. It was proved that the defendant, who was a constable, levied on a wagon belonging to one Godfrey by virtue of an attachment against him; that the wagon afterwards went into the custody of Parker, and that while in his possession an employee of his took the cleaves and whiffletrees from the wagon and attached thereto others belonging to Parker, and that the defendant in this action afterwards repossessed himself of the wagon with the cleaves and whiffletrees of the plaintiff attached to it. At the trial before the justice the jury found for the defendant. But the judgment of the justice was reversed by the Common Pleas. The Supreme Court, in reversing the judgment of the Common Pleas, said: "Trespass will not lie under the circumstances of this case. The right of Walrod to take the wagon is not contested. At least the plaintiff pretends to no right to the wagon, and founds his action exclusively upon the taking of the whiffletrees and cleaves, which are conceded to have been his. But having substituted his own for those which belonged to the wagon and were upon it when he took it, without the knowledge of the defendant, the defendant was not a trespasser for taking them with the wagon. Suppose the case put by the counsel, that Parker had taken out the linch-pins belonging to the wagon, and had substituted others for them, or had changed one of the bottom boards or end boards, or had put in a new king bolt, or any other change not so obvious as to attract the attention of the officer, can it be endured that he should be held liable as a trespasser for taking these things thus attached to the wagon by Parker himself, or his servant, in their own wrong. They ought to be considered as incident to the principal thing, the wagon, and having a right to take that, the officer cannot be a trespasser for taking them. The action of trover affords the party under such circumstances all the remedy which he ought to have. The officer must then have notice of the claim, and upon demand made can restore what does not belong to him without being subjected to the costs of a suit." The judgment of the Supreme Court was unanimously affirmed by the Court of Errors. The chancellor said: "I have no doubt that the Supreme Court was right in holding that if the plaintiff, or his servant, had exchanged the whiffletrees and cleaves, and affixed his own to the wagon without the knowledge or consent of the constable, an action of trespass would not

§ 480. The attachment of a chattel held in common, on a process against one of the tenants in common as his sole property, is not equivalent to a destruction of the chattel, so as to give the other tenant the right to an action of trespass against the attaching creditor who succeeds to the rights of one of the tenants, or the officer who made the attachment. The right of the cotenant to the possession of the property would be tolled for the time being by the attachment, and he could not for that reason maintain trespass.¹ *

lie against the latter for taking them away with the wagon unless he was aware of the fact that they had been thus changed, provided he was justified in taking the wagon itself. From the evidence before the justice, there can be no doubt that the constable acted in good faith, believing that the whiffletrees and cleaves were the same which he had originally attached with the wagon as the property of Godfrey. It was the plaintiff's own fault, therefore, that this mistake occurred, and if any action could be sustained against the constable without returning to him the whiffletrees and cleaves which actually belonged to the wagon, of which I have some doubt under the circumstances of this case, it must have been an action of trover for refusing to return the property to the plaintiff after the constable was informed of the mistake which had occurred."

¹ Welch v. Clark, 12 Vt. 681.

* In Vermont, it was decided that if an officer attach the property of tenants in common upon a writ against one, take possession of it, and hold it until the issuing of an execution, and then sell the entire property, and thus divest the interest of the other tenant, he does not thereby become a trespasser *ab initio*. In *Heald v. Sargeant*, 15 Vt. 506, in which this was held, the court said: "In the case of *Ladd v. Hill*, 4 Vt. 164, it would seem to have been determined that a sale upon execution of the entire chattel, although upon the debt of but one of the tenants in common, did divest the title of the other tenant, and was, in law, a conversion of his interest. Where the taking was on the execution, the sale would in that view be such an abuse of the authority as would make the officer a trespasser *ab initio*. We are now asked to extend the same rule, so as to make the taking upon the original writ a trespass. The case of *Melville v. Brown*, 15 Mass. 82, as understood by the same court, in *Weld v. Oliver*, 21 Pick. 559, would seem to be an authority to that extent. But the case as reported only shows a taking on the same process on which the sale was made. It does not seem to have been much considered by court or counsel, and being a mere abstract of the point decided, cannot be much relied upon as an authority. And it being a well settled point that the attachment of the whole property, and the whole proceedings under the first process were legal and regular, we could not make the officer a trespasser for any irregularity in the sale upon the execution, which is a distinct matter."

Where an officer who had an execution against one of two tenants in common to whom salt in a wagon belonged, seized the horses for the purpose of levying on the salt, it was held that he was not a trespasser (*Blevins v. Baker*, 11 *Ired.* 291).

The interest of one of two joint owners of personal property may be attached for his private debt, and the property may be removed by the officer, notwithstanding some of the stipulations contained in an agreement between the joint owners will thereby be violated. *Remington et al. v. Cady*, 10 Conn. 43, was an action of trespass *de bonis asportatis* brought by Remington and Perry against a deputy sheriff. It appeared that Remington rented his farm to one Perry to be cultivated "to the halves," one-half of all the produce when fit for market to be

§ 481. But where an officer under an execution against one of two tenants in common of goods, sells the entire property, he becomes a trespasser, *ab initio*.¹ * The officer may however lawfully take goods owned by tenants in common by virtue of an execution against one of them, and sell the interest of that one, and deliver the property to the purchaser, who will become a tenant in common with the other owner.² In an early case in New Hampshire,³ it was held,

delivered at a certain place free of expense, and that Perry, having raised and harvested a quantity of corn and buckwheat, the defendant attached Perry's interest therein to secure the private debt of Perry; that the defendant having husked the corn and winnowed the buckwheat, removed one-half of each, and that this action was brought while the property attached remained in the custody of the law, holden to respond to the future judgment. The court, in holding that the plaintiffs were not entitled to recover, said: "It may be readily admitted that it was not in the power of the officer to sever the joint ownership of this property; that he would have been justified in removing the whole or so much of it as that Perry's undivided interest in that which was taken would have been sufficient to answer the demands against him, and that when the property came to be sold on execution, Perry's undivided interest only could have been disposed of. And it may be further admitted that the property might have been so conducted with, or so disposed of, as to subject the officer, and those concerned with him, to this action. But we are not called upon to decide what would have been the correct mode of proceeding under an execution, nor what might have been the unlawful disposition of the property. The action, it should be remembered, was brought while the suits under the attachments were still pending; while the property was yet in the custody of the law, and holden to respond to such judgments as might eventually be recovered. The case does not rest on the ground of an unlawful disposition of the property, but upon the ground of an unlawful taking. The argument upon this part of the case proceeds on the idea that the officer might have taken, and ought to have taken, all the property, but inasmuch as he has taken a part only, he is a trespasser. It is not very easy to discern the connection between the premises and the conclusion. It would seem that the power to take the whole involved a power to take a part only. Nor does it vary the case that the officer undertook to do a nugatory act, nor that he called the part of the property which was left Remington's and that which was removed Perry's. Neither the act nor the declarations of the officer can alter the law, nor in any way affect the rights of the parties. His return shows that he levied the attachments upon the undivided half of all the property. He confessedly had a right to the whole under this levy. He has removed only a part, and with regard to the residue has left the parties to the same rights of ownership as existed before."

¹ Waddell v. Cook, 2 Hill, 47; note *a*, *Ib.* p. 49; Melville v. Brown, 15 Mass. 82; Sheppard v. Shelton, 34 Ala. 652; Johnson v. Evans, 7 Man. & G. 240; Walsh v. Adams, 3 Denio, 125; Fiero v. Betts, 2 Barb. 633.

² Lothrop v. Arnold, 25 Maine, 136.

³ Pettengill v. Bartlett, 1 N. Hamp. 87; referring to Heydon v. Heydon, 1 Salk. 392; Eddie v. Davidson, Douglass, 650; Fox v. Hanbury, Cowp. 445; Smith v. Stokes, 1 East, 363.

* In White v. Morton, 23 Vt. 15, it was held that in such a case, trover might be maintained by the cotenant against the sheriff for his undivided share of the property; and in Smith v. Tankersley, 20 Ala. 212, it was held that the cotenant might waive the tort, and sue for the value.

that as the officer had a right to seize the whole, and deliver the same to the purchaser of the debtor's share, it was immaterial to the other owner whether he sold the whole, or only the debtor's interest, and the sale of the whole would not be a trespass. But this decision was afterward overruled.¹*

§ 482. The share of one of several copartners in the goods of the firm may be attached and sold on execution for his individual debt. And, as incidental to this right, the officer may take possession of the goods seized, and deliver the whole to the purchaser.† But if he sells the entire

¹ Moulton v. Robinson, 7 Fost. 550; approving White v. Phelps, 12 N. Hamp. 382.

* Mersereau v. Norton, 15 Johns. 179, was an action of trespass brought by Norton against Mersereau, in a justice's court for taking and selling a yoke of cattle. It appeared that the cattle were owned by Norton and another person, and that they were taken out of Norton's possession, and sold by the sheriff under an attachment; that the plaintiff forbade the taking and also the sale, but said nothing about owing the cattle; that the defendant was present and ordered the sheriff to take them, and was also present at the sale, and directed the sheriff to proceed. The jury having found a verdict for the plaintiff, the question before the Supreme Court was whether a sheriff had a right under an attachment to take and sell property of which the absconding debtor was only a tenant in common, when that property was found in the possession of the other cotenant; and it was held that he had such a right beyond doubt, there being no other way to get at the interest of the one against whom the attachment issued. The court said: "It is observable in this case, that although upon the trial, it appeared that the plaintiff below and the absconding debtor were tenants in common of the oxen, yet neither when they were first taken, nor when they were sold, did the plaintiff allege this, or that he had any claim to the property. Had a claim of property been interposed, the sheriff must have summoned a jury to try the right, and the sale would have been only of the interest of the absconding debtor, as in case of a sale under an execution of the property of joint partners. The sheriff in such cases, seizes all, and not a moiety of the goods sufficient to cover the debt, and sells a moiety thereof undivided, and the vendee becomes tenant in common with the other partner. Although the sheriff sold the oxen as the sole property of Norton, yet no more than his interest passed, and the plaintiff below became tenant in common with the purchaser. The sheriff who took the oxen, and all who aided him, and the purchaser, must certainly have all the rights and interest of Norton, the absconding debtor; and one tenant in common of a chattel cannot maintain trover or trespass against his cotenant."

† There has been some question as to what ought to be sold on an execution against an individual member of a firm, whether it was the partner's joint interest in the whole concern, subject to a final settlement, or whether it was his interest in each particular article. It would seem that in the King's Bench measures have at times been taken to secure the former only, and protect the rights of the creditors or other partners in the joint concern, and hold the property first liable to the joint debts; and this seems, in some measure, to have been followed in Massachusetts. In the Court of Common Pleas, however, in England, such course has been declined, and the parties have been directed to seek all such relief in Chancery. In Reed v. Shepherdson, 2 Vt. 120, the court entirely

property in the goods, it is such an abuse of his legal authority as will make him liable as a trespasser *ab initio*, and an action may be maintained against him in the name of all the members of the firm. With respect to such members of the firm as are not parties to the execution he is a trespasser, because he has sold their share of the property to pay the debt of others, without any precept or authority in law authorizing him so to do; and with respect to the debtors themselves, because he has sold their shares jointly with the shares of others, and thereby rendered it impossible to determine what proportion of the purchase money belongs to them, and how much of it ought to be indorsed on the execution, and because it is their right to have their shares sold separately, to the end that they may not only know the precise amount for which they are sold, but because the sale of a larger amount of property in bulk may injuriously affect the price by limiting the number of bidders.¹ *

§ 483. An officer, by selling the entire property in goods on an execution against the mortgagor, will become a tres-

denied the adoption of any such course as a court of law. It was there holden that the partnership effects could be attached on the debt of one partner, and his interest sold on execution, and that such taking and sale were no trespass or tortious conversion, though the concern was insolvent and he had no ultimate interest on a final settlement.

In an action for the wrongful taking of personal property, all the members of the plaintiff's firm, part of whom were the defendants in an attachment under which the property in question was seized by the defendant, as sheriff, claimed to maintain the action against the sheriff as a wrong-doer, on the ground that he had seized and taken into his custody, under an attachment which directed him to attach and keep the property of two only of the three members of which the partnership consisted, certain personal property that belonged to the plaintiffs collectively as a partnership. It was held that the sheriff had a right under the attachment to take and hold the property (*Smith v. Orser*, 43 Barb. 187; *aff'd* 42 N. Y. 132).

A. and B. separately bought one-half of the stock in trade of a judgment debtor, and afterward conducted the business as partners. An officer seized and sold the property under an execution against the judgment debtor. In an action of trespass, by the partners against the officer, it was held that he was liable, although one of the partners had bought in fraud of creditors (*Farrel v. Colwell*, 1 Vroom, 123).

¹ *Walker v. Fitts*, 24 Pick. 191; *Melville v. Brown*, 15 Mass. 82; *Waddell v. Cook*, 2 Hill, 47; *Moore v. Pennell*, 52 Maine, 162.

* Such a sale being illegal, and rendering the officer a trespasser *ab initio*, the partners will be entitled to recover the full value of the goods sold, leaving the judgment, to satisfy which the property was sold, in no part satisfied (*Moore v. Pennell*, *supra*).

passer *ab initio*.¹ In *Wheeler v. McFarland*,² which is a leading case, the plaintiff had a lien for advances made by him to the judgment debtor on the property levied on by the sheriff, who had notice of the facts, but who, nevertheless, proceeded to take possession of, and advertise for sale, the whole of the property as belonging absolutely to the debtor. It was held that, by thus acting, he rendered himself liable as a trespasser *ab initio*, so as to entitle the plaintiff to a recovery against him in an action of replevin. It is true that the lien of the plaintiff in that case was created by a pledge, and not by a mortgage, but the rights and interests of a mortgagee are as much entitled to protection as those of a pledgee.

§ 484. A mere wrongful levy, without the removal of the property or interfering with it in any other way, will make the officer a trespasser.³ It is enough if, by menace, threat, or exercise of legal process, the owner is excluded from the possession and control of it. If no possession is taken by an officer on an attachment, perhaps the mere return of an attachment would not subject the officer to an action; but if the possession and control are assumed to the exclusion of the owner, the action lies.⁴ Where an officer had under his control goods levied on, though there was no manual seizing of them, and was about to take them away, and would have done so, but for the security given him that they would be forthcoming, it was held that as he had exercised dominion over them, he was liable.⁵ So, where a collector levied on a person's goods by virtue of a warrant against other parties, issued for a debt which he was under no obligation to pay, threatened to remove the property, and gave the owner written notice that he would sell it on a

¹ *Frisbee v. Langworthy*, 11 Wis. 375.

² 10 Wend. 318.

³ *Wheeler v. McFarland*, 10 Wend. 318; *Allen v. Crary*, Ib. 349; *Stewart v. Wells*, 6 Barb. 79; *Connah v. Hale*, 23 Wend. 462; *Stevens v. Somerudyke*, 4 E. D. Smith. 418; *Gibbs v. Chase*, 10 Mass. 125; *Miller v. Baker*, 1 Metc. 27; *Paxton v. Steckel*, 2 Penn. St. R. 93; *ante*, § 422.

⁴ *Hart v. Hyde*, 5 Vt. 328.

⁵ *Wintringham v. Lafoy*, 7 Cowen, 735.

specified day, if he did not previously pay the demand, and he paid it when the collector was about to remove his property for sale, it was held that the collector was liable in trespass.¹ In *Robinson v. Mansfield*,² it was contended, on the part of the defendants, that as the horse, wagon, and harness, for the taking of which the action was brought, were delivered to the plaintiff upon his receipt, and were not removed, there was no asportation, and that a mere technical attachment would not support the action; that if the action would lie, the damages must be nominal, as the property went instantly back into the hands of the plaintiff, and he had ever since had the enjoyment of it; and that the contract for redelivery made no difference, it being void for want of consideration, if the officer committed a trespass in attaching it. It was held, however, that as the property was delivered to the plaintiff on a contract to redeliver it to the officer on demand, it was to be regarded as if it had been delivered to a stranger on a like contract.*

¹ *Wetmore v. Campbell*, 2 Sandf. 341.

² 13 Pick. 139; and see *Phillips v. Hall*, 8 Wend. 610.

* Where the sheriff takes the property of B. upon an execution against A., it is an act done in his official capacity, within the statute of New York requiring suits against sheriffs and coroners for official acts to be brought within three years (*Dennisop v. Plumb*, 18 Barb. 89). In *Morris v. Van Voast*, 19 Wend. 283, the action was trespass. The defendant alleged the taking of the property in his official capacity as sheriff, and pleaded the three years' statute of limitation. It was held that the statute had no application to the case; that it applied only to cases of official liability such as enable the aggrieved party to resist the official bond; that if the defendant was guilty of a trespass, he could not maintain that the liability in the case was incurred by doing an act in his official character; that the act might have been done *colore* but not *virtute officii*. In *Ex parte Reed*, 4 Hill, 572, judgment had been recovered against Hart, the sheriff of New York, in trespass, for the seizure of the goods of Reed under a *fi. fa.* Hart had attempted to justify the seizure as sheriff. A motion was made for leave to prosecute the official bond of the sheriff. It was denied upon the ground that the act of Hart, for which judgment had been recovered, did not come within the condition of the bond. It was held that the words could not be extended beyond nonfeasance or misfeasance, in respect to acts which, by law, he is required to perform as sheriff; that the sureties could not be made liable for the consequences of a trespass committed by the sheriff. Cowen, J., said that the charge of a trespass assumed that the act could not have been *virtute officii*, and that it was no more the act of the sheriff, because done *colore officii*, than if he had been destitute of process. In *The People v. Schuyler*, 5 Barb. 166, the action was upon the official bond of Schuyler as sheriff. Judgment had been recovered by the relator against Schuyler, in an action of trespass for taking the property of the relator. Schuyler, as sheriff, had taken the property of Kellogg, the relator, upon an attachment against the property of one Fox.

§ 485. An officer cannot legally stay in another's building to keep attached goods therein; nor authorize any other person to remain therein, as keeper for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser.¹ And where an officer, who has entered on land, in order to make a levy under an execution, remains there an unreasonable time, he becomes a trespasser. What is a reasonable time when the facts are not disputed, is a question of law.² Five hours of daylight was held more than a reasonable time to remove an attorney's desk and law books of not more than two hundred dollars in value.³

§ 486. If while an officer, who has a right to levy on goods in a building, is engaged in removing them, exercising reasonable care, he unintentionally does some small injury to the building, he will not thereby become a trespasser *ab initio*. But if he remove the goods unnecessarily, or at an improper time, he will be liable. Where an officer, in attaching a lathe and other machinery in a mill, found that there was a platform nailed to the sills of the lathe; that the lathe could not be removed without taking the platform to pieces—the design of the platform being to accommodate the operator better in the use of the lathe; and that it was also necessary to take down a partition which had been put at

The New York Supreme Court held that no action could be maintained upon the bond; that the act of the sheriff was to be regarded as a trespass done *colore officii*, and not *virtute officii*. But the judgment was reversed by the Court of Appeals, and thus the case of *Ex parte Reed* was, in effect, overruled.

In *Seeley v. Birdsall*, 15 Johns. 267, the court remarked that there was a distinction between acts done *colore officii* and *virtute officii*. That, in the former case, the sheriff is not protected by the statute when the act is of such a nature that his office gives him no authority to do it; but that when, in doing an act within the limits of his authority, he exercises that authority improperly, or abuses the confidence which the law imposes in him, to such cases the statute extends.

¹ *Malcolm v. Spoor*, 12 Metc. 279; *Rowley v. Rice*, 11 Ib. 337.

² *Spoor v. Spooner*, 12 Metc. 281; *Pratt v. Farrar*, 10 Allen, 519; but see *Ash v. Dawnay*, 8 Exch. 243, and *Playfair v. Musgrove*, 14 M. & W. 239.

³ *Williams v. Powell*, 101 Mass. 467.

one end of the lathe; it was held that he had a right to remove the platform and partition in a proper manner, if found necessary, and that his omission to replace them was but a *non-feasance*, which did not make him a trespasser *ab initio*.¹ But where an officer, having attached hay and grain, removed them without any necessity, it was held that the damage and waste incident to such removal must be considered as wantonly caused by the defendants, and that such wanton and illegal use of process worked a forfeiture of the protection which the process would otherwise afford; and furthermore, that had there been a necessity to remove the property, the doing of it at an unfit and unseasonable time, when it must inevitably be exposed to great and unnecessary waste, would have been such an abuse as to render all concerned in it trespassers.^{2*}

§ 487. An officer who seizes property by authority of law, must show that he has done all that is required of him in order to complete and fulfil the duty imposed on him. If he does not comply with the directions of the writ, and keeps the goods beyond the time when, by the requirements of the statute, they should have been sold; or if he fails to keep them the requisite number of days after an authorized seizure; or if the notice of sale be insufficient, or the time or place of sale be unauthorized, he becomes a trespasser *ab initio*.³ The defendant cannot discharge himself of his legal obligation by showing that the plaintiff had notice derived

¹ Fullam v. Stearns, 30 Vt. 443.

² Barrett v. White, 3 N. Hamp. 210.

³ Brackett v. Vining, 49 Maine, 356; Ordway v. Ferrin, 3 N. Hamp. 69, *contra*; Knight v. Herrin, 48 Maine, 533; Bond v. Wilder, 16 Vt. 393; Hall v. Ray, 40 Ib. 576; Gilmore v. Holt, 4 Pick. 258-263; Smith v. Gates, 21 Ib. 55; Brightman v. Grinnell, 9 Ib. 14; Adams v. Adams, 13 Ib. 384; Purrington v. Loring, 7 Mass. 388; Sherman v. Braman, 13 Metc. 407; Folger v. Hinckley, 5 Cush. 263; Carrier v. Esbaugh, 70 Penn. St. R. 239.

* In this case, a very large quantity of hay and of grain in the straw was attached and removed from the barn forthwith. The seizure was made a little after midnight, when the weather was very unfavorable for the removal of the property, and it resulted in great waste. The debtor, who resided about fifty miles from the place where the attachment was made, had in his possession a considerable amount of property, while the claims of the attaching creditor did not amount to a very large sum.

from other sources of the facts which the statute requires to be made known to him by the defendant, in writing. If it were so, a verbal notice would be sufficient, and the statute would be rendered inoperative and useless. The plaintiff has a right to insist upon the precise notice required by law. Upon it his rights and remedies may materially depend; and unless he has misled the defendant and induced him to omit it, the failure to give the written notice in the manner required by the statute will be a fatal defect in the proceedings, and deprive the defendant of his justification.¹* In Vermont, the officer was held liable as a trespasser where the notice of sale of a horse seized and impounded under the statute, did not mention the place where the horse was to be sold. The facts of the case were as follows: Clark, being a private in a militia company had neglected to appear on a day appointed for parade, and was fined. An execution was put into the hands of Balch, the orderly sergeant of the

¹ Coffin v. Field, 7 Cush. 355; Sawyer v. Wilson, 61 Maine, 529.

* In Smith v. Gates, 21 Pick. 55, the defendant justified the taking and selling of the plaintiff's horse, on the ground that the horse was at large on the highway, and the defendant, being a field driver, impounded him in the common pound, and the plaintiff neglecting to pay the forfeiture and expenses accruing in consequence of the impounding, the horse was sold at public auction to discharge the same. The proceedings in such cases, in Massachusetts, are regulated by the Revised Statutes, chs. 19 and 113—the former authorizing the taking and impounding, and the latter directing the mode of proceeding after the beasts are impounded. It is incumbent on the defendant to show that all his proceedings have been in entire conformity with the provisions of these statutes. Sections 11 and 12 of ch. 113 provide that if the sum for which any beast is impounded and detained shall not be paid within fourteen days after notice is given of the impounding, two appraisers shall ascertain and determine the sum due from the owner of the beast, and if the sum so found to be due shall not be forthwith paid, the person who impounded the beast shall cause it to be sold at auction, "first advertising the sale by posting up a notice thereof twenty-four hours beforehand at some public place in the same town." In the foregoing case, it appeared that the appraisement was completed at half past ten o'clock, A. M., of the 30th of May; that, quarter before ten o'clock of the same day, the defendant had posted up an advertisement for the sale to take place at ten o'clock, A. M., of the following day, and that the horse was actually sold at ten minutes after ten o'clock, A. M., on the 31st of May. The property was therefore advertised before the appraisement of the damages and charges, and the sale took place in less than twenty-four hours after the appraisement. It was held that there had been such a departure from the directions of the statute, that the proceedings were void. The court remarked, that entire strictness in such cases was requisite, and it was not material whether any actual injury was sustained by this omission or neglect of the defendant, that, as the defendant had failed to conform to the statute, he had clearly made himself a trespasser *ab initio*, and the plaintiff was entitled to recover the value of the horse so taken and sold.

company, for collection, who levied on a horse belonging to the delinquent, advertised the same for sale, and sold after the usual time of notice. The delinquent having brought his action of trespass against Balch, it appeared that after the advertisement had been posted up four days it was discovered that the place of sale had not been mentioned, and that it was then supplied by the officer. The sale which was made ten days afterward, was held by a full court to be irregular, and the plaintiff recovered. Paddock, J., said: "The only object in advertising property for sale is to give notice to those who may wish to purchase of the time and place where the same will be offered; and without specifying both, neither the spirit nor intent of the statute is complied with. The statute is to have a reasonable construction; and if one part might be dispensed with to suit one case, another part might be to favor some other, and so on until the whole statute would be frittered away. The time might be better omitted than the place where a sale is to be made; for, if the time were omitted, one intending to purchase could employ another to give him notice when the article was set up; but the place being omitted, he could employ no means to be informed."¹*

¹ Sutton v. Beach, 2 Vt. 42.

* Carnrick v. Myers, 14 Barb. 9, was an action brought to recover the value of a pair of horses sold by the defendant, a deputy sheriff, to satisfy executions in his hands. The property in question was levied on in February. In June defendant offered it for sale, but after one or two bids, the plaintiff objecting to the sale on the ground that the horses were exempt, the sale was postponed, and an arrangement was made by which the plaintiff turned out the horses to be sold at a future day, in case the execution should not in the mean time be paid. The horses were subsequently sold by the defendant, the sale being made after sundown. Held, that as a sale, by virtue of an execution, made after sunset, was void under the statute, the defendant became a trespasser *ab initio*. Parker, J., in delivering the opinion of the court, said: "I think the referee was right in holding that the effect of this was, that the proceedings of the sheriff were void *ab initio*. The levy was made by virtue of the execution last received by the sheriff. It was not until four months afterwards, when the defendant was about to sell the property, and after the plaintiff had objected to the sale, on the ground that the horses were exempt, that the plaintiff 'turned out the property,' as the witness calls it, to the sheriff. It was, in fact, nothing more than waiving a claim of exemption to gain time; that is, it was giving a consent to what the defendant had already done, and had a right to do, under the last execution. I think the defendant was acting under a claim of authority given by law, and not under authority given by the party. Under such circumstances, the abuse by the de-

officer, of an execution sale, will not render him liable in trespass to the judgment debtor, if the postponement, in form and substance, was made at the request of the debtor's agent.¹

§ 488. Where an officer, in taking property on execution, conducts with it in a manner different from what the law directs, he cannot protect himself under the execution, but becomes a trespasser *ab initio*.² In *Nash v. Mosher*,³ Judge Cowen remarked, that all the cases agree that the mere user of any article in any way not necessary to its safety or preservation, by a distrainer, makes him a trespasser *ab initio*, for the reason that, although he took possession colorably under a lawful authority, yet the subsequent abuse leads to the presumption that he all along acted fraudulently. But in

defendant would make him a trespasser *ab initio*" (citing *Dumont v. Smith*, 4 Denio, 319; *Allen v. Crofoot*, 5 Wend. 506).

A notice of sale, insufficient for want of time, is not cured by an adjournment of the sale, so as to embrace the whole time required by the statute. The postponement would not cure the defect in the original notice. The officer "could not make a valid sale at the adjournment, which would have been invalid if made on the day adjourned from. Legality in such case cannot be predicated upon illegality" (*Sawyer v. Wilson*, 61 Maine, 529).

An officer who sells goods under an attachment, without complying with the requirements of the statute, becomes a trespasser *ab initio*, and may be sued, notwithstanding the action, in which such property was attached, is still pending. In *Ross v. Philbrick*, 39 Maine, 29, at the trial in the court below, the defendant's counsel requested the judge to instruct the jury that as the property sued for was lawfully attached, and that suit still pending, the plaintiff could not maintain the present action; but the judge declined so to instruct. On this point, the Supreme Court, per Cutting, J., said: "It is contended that so long as the process, upon which the property in controversy was attached, is pending in court, the plaintiff cannot sustain this action, because otherwise the defendant might be compelled to pay twice for the same property; to the plaintiff in the first instance, and subsequently to the attaching creditor. If it be so, it is not the only case where the *tort-feasor* is made liable to pay double or even treble damages. Consequences may be more properly the subject of consideration by the party, before the fact, than by the court subsequently, in determining the law. An officer, who has been guilty of a trespass from the beginning, cannot invoke to his aid the process which he has abused. He places himself in the same situation he would have occupied had he seized the property without any process, and taken it from the owner's possession. And what consequence is it to the officer, or the attaching creditor, that the suit is pending when the attachment is dissolved, and can no longer be made available to satisfy a subsequent execution?"

An officer is not obliged to receive the amount of an execution and interest, unless his fees are also tendered (*Joslyn v. Tracy*, 19 Vt. 569).

¹ *Wilton Manuf. Co. v. Butler*, 34 Maine, 431.

² *Bond v. Wilder*, 16 Vt. 393.

³ 19 Wend. 431.

order to make an officer liable as a trespasser *ab initio*, for using personal property attached by him, the property must have been injured or used by the officer for his own benefit, or for the benefit of some one other than the debtor. *Paul v. Slason*¹ was an action of trespass for taking horses, harness, a wagon, and other personal property. The defendant justified the taking by virtue of a writ of attachment. It appeared that the defendant used the plaintiff's team in removing part of the property attached, and that he also used a pitchfork, belonging to the plaintiff, for the same purpose. It was held that the officer did not thereby become liable as a trespasser.* And the officer, to be deemed a trespasser *ab initio*, must have either been an actor in the original taking, or have made himself a party thereto by his assent before or after the act. In *Van Brunt v. Schenck*,² a schooner belonging to the plaintiff, was seized by Van Beuren an officer of the customs, for violation of the revenue laws of the United States. Whilst the vessel was lying under this seizure and in the custody of the officers of government, the defendant, who was also a custom house officer, applied to Van Beuren for the use of the schooner to carry his, the defendant's furniture, from his country seat, about eight miles from the city of New York, to his house in the city. The

¹ 22 Vt. 231.

² Anthon's N. P. 2d ed. p. 217; s. c. 11 Johns. 377; 13 Ib. 414; see 4 Denio, 321.

* In *Paul v. Slason*, *supra*, the court said: "It is true that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property, and gives nominal damages. This goes upon the ground, either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrong-doer. This last, applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights, when the unlawful act might have an effect upon the right of the party, and be evidence in favor of the wrong-doer, if his rights ever came in question. In these cases, an action may be supported, though there be no actual damage done—because otherwise, the party might lose his right. So too, whenever any one wantonly invades another's rights for the purpose of injury, an action will lie, though no actual damage be done. The law presumes damage on account of the unlawful intent. But it is believed that no case can be found where damages have been given for a trespass to personal property, when no unlawful intent, or disturbance of a right or possession, is shown, and when, not only all probable, but all possible damage is expressly disproved."

defendant accordingly transported his furniture in the vessel as specified, and employed her in plying between the two stations about two days, and then returned her to the custody of Van Beuren. The schooner being libeled and sold by order of the court, was afterwards, on the hearing, acquitted, the judgment of the court being accompanied with a certificate of probable cause of seizure; and the proceeds of sale were ordered to be paid over to the owner who, however, declined to receive them. The present was an action of trespass for the use by the defendant of the schooner, as above. There was nothing which implicated the defendant as an actor in the seizure of the vessel, or which showed the least co-operation by him in that act, any further than the circumstance that he was one of the custom house officers. It was ruled at the circuit that the improper use of the vessel, while under seizure and in the custody of the officers of the government, rendered the defendant liable for the original seizure, and made him a trespasser *ab initio*, and subjected him to damages to the value of the vessel at the time of her seizure. The Supreme Court, however, granted a new trial on the ground that, as the defendant was not implicated in the first taking, the ruling at the circuit was erroneous. At the second trial, it appeared that the seizure was ratified by the defendant, and the court, in nonsuiting the plaintiff, held that the defendant would have been a trespasser *ab initio*, if there had not been a certificate of probable cause; but that, under the circumstances, the plaintiff's remedy was by special action on the case.*

* In *Van Brunt v. Schenck*, *supra*, Thompson, Ch. J., placed the decision of the Supreme Court entirely upon the legal effect of the certificate of reasonable cause of seizure, given on the acquittal of the vessel, holding that, independently of this certificate, the case would have fallen within the rule that the abuse of an authority given by law makes the abuser a trespasser *ab initio*. The act of Congress (of March 2d, 1799), declares that, where there is a certificate of reasonable cause of seizure, the person who made the seizure, or the prosecutor, shall not be liable to action, suit, or judgment, on account of such seizure. This certificate does not shield the person making the seizure from responsibility for damages which may be occasioned by any subsequent abuse of his authority. It only goes to protect him from an action on account of the seizure—that is, if there was reasonable cause for the seizure, the person making it shall not for such act be deemed in any manner responsible. But to make the defendant a

§ 489. An attachment of personal property may be justified without showing regular subsequent proceedings. But

trespasser *ab initio*, would be making him responsible for the act of seizure for which the statute declares he shall not be answerable. This construction gives full force and effect to the certificate of reasonable cause, and still makes the seizing officers liable for all injury occasioned by an abuse of their authority. Any other construction renders the certificate a nullity. The seizing officer is, by the certificate, put in the situation of a person who is guilty of an abuse of an authority in fact, who does not thereby become a trespasser *ab initio*, but is liable to make satisfaction to the owner of the property for the abuse of his authority.

The following are the material portions of the opinion of Spencer, J., in the above case: "It is insisted that, the schooner being in the custody of the law, the use or abuse of her by the defendant, though with the license of the officer who took her, rendered the defendant and all concerned trespassers *ab initio*, and that therefore the plaintiff can maintain trespass against the defendant. This point is not defensible unless the defendant is implicated in the first taking, and that he is not, the facts plainly show. * * * It would be palpably absurd to say that a man, totally unconcerned with the original caption of goods, shall, for an after act to those goods, be deemed to have originally taken them. Still, however, it is contended that Van Beuren, having no right to use the vessel, could impart none; and the plaintiffs, having the general property, possession followed it, and that both uniting they could maintain trespass against the defendant, and more especially, as the defendant knew the vessel was under seizure when the defendant took the vessel, the plaintiffs were clearly dispossessed of her. Nor had they then a right to reduce her to actual possession; for she had been seized under the authority of the law, and was then in the custody of the law, adversely to the plaintiff's claim of property. Still, however, it is urged that Van Beuren was at all events a trespasser *ab initio*, by his licensing the defendant to use the vessel, and that this act re-invested the plaintiffs with their first right of property, and also the right to reduce the vessel to their immediate possession. It seems to have been forgotten by the counsel who urged this argument, that Van Beuren's giving leave to the defendant to take the vessel, is not an act which would even render him a trespasser *ab initio*. It was the act of taking her and using her which alone could produce that effect; and not until after the commission of that act, would Van Beuren have violated the authority given him by law to seize and hold the vessel. The act of taking and using the vessel, is indivisible. When the defendant first entered on it, it must be admitted the plaintiffs had neither the possession nor the right to reduce the vessel to their possession, and therefore at that time they had no right to bring trespass. To maintain that trespass would lie against the defendant, the counsel must be driven to the necessity of splitting up the defendant's act and making him a trespasser, not for entering on board the vessel and casting off her fasts, but for sailing in her. This mode of considering and treating the action may well be pronounced an anomaly in the law of trespass, without precedent and without authority. The true and only test is to consider whether, when the first act was done which consists of a series of acts, the defendant was guilty of trespass toward the plaintiffs. If he was not, then he cannot in this case be so afterward."

Van Ness, J., delivered a dissenting opinion, in which Platt, J., concurred, the substance of which, omitting the cases cited, and quotations therefrom, was as follows: "Whether this suit can be maintained strictly on the principle that the defendant is a trespasser by relation, it is not material to inquire, because I think he is liable in this form of action on another ground. It has long been well settled that actual possession is not necessary to enable the owner to maintain trespass or trover as it respects personal property. The plaintiffs in this case were the undisputed owners of the schooner until she was unlawfully seized by Van Beuren. I say *unlawfully*, because, as she was acquitted in the District

the subsequent unlawful disposal of the property will deprive the officer and attorney of justifying the original taking under valid process, and cause them to be regarded as standing in the position of strangers.¹* Although an

Court, were it not for the certificate of probable cause, Van Beuren might have been prosecuted as a trespasser for the original taking. This certificate, however, can in no way protect either Van Beuren or the defendant against an action for their illegal use of the vessel after the seizure. That Van Beuren became a trespasser from that moment, *ab initio*, is not questioned. The cases cited on the argument are decisive on that point. The certificate of probable cause would afford him no protection against an action of trespass founded upon the abuse of his authority. From the moment therefore Van Beuren lent this vessel to the defendant, his official character was lost, and he is to be treated like any other private individual who wantonly and illegally wrests from another his property. The vessel ceased to be in the custody of the law after Van Beuren had parted with her to the defendant, for a purpose utterly repugnant to his duty as a public officer, and by which he confessedly became as much a trespasser as if he had acted without any authority or license from the beginning. While this vessel was in the employment of the defendant, he held her by wrong, and the plaintiffs had a clear and incontestable right to resume the possession of her, if they were disposed to exert it, wherever they found her. This right results as a direct and necessary consequence of that principle of law by which Van Beuren is deemed to be a trespasser *ab initio*. He stands in the same situation as if he had acted without any authority. Like every other trespasser, his possession was tortious; and the owner might, at his election, either have affirmed the possession and property in him, by bringing an action of trespass, or he might have brought *replevin* to have the thing restored to him and recover his damages for the first taking. A moment's consideration will show that, if the plaintiffs were entitled to the possession as between them and Van Beuren, they are equally so as between them and the defendant. * * * * If the plaintiffs could have taken her from Van Beuren after he became a trespasser, does it not follow that they had the same power after she came into the hands of the defendant, in consequence of an act flagrantly illegal to which both he and Van Beuren were parties? It seems to be admitted that the defendant is bound in some form of action to compensate the plaintiffs for the use of the vessel. Does not this demonstrate his possession of her to have been tortious and illegal? And here it is material to observe that if a person is once liable as a trespasser for an illegal taking of the goods of another, he shall answer for their full value unless they are restored to the owner; in which case, the restoration may be given in evidence in mitigation, but not in bar of the suit. I can see no reason, therefore, why the defendant as well as Van Beuren, is not liable in this form of action for his illegal and unjustifiable use and employment of the vessel as a distinct and independent trespass."

¹ Eaton v. Cooper, 29 Vt. 444; Stoughton v. Mott, 25 Ib. 668; Ross v. Philbrick, 39 Maine, 29; Everett v. Herrin, 48 Ib. 537.

* In Maine, the statute, R. S. 1841, ch. 114, § 64, providing that "when goods are sold and disposed of after an appraisal, the proceeds thereof, whilst remaining in the hands of the officer, shall be liable to be further attached by him as the property of the original defendant, in like manner as the goods themselves would have been liable if they had remained in the possession of the officer," presupposes a sale in compliance with the statute. If it appear that the sale was illegal, the officer will be deemed a trespasser from the beginning. (Everett v. Herrin, *supra*).

In an action for an excessive attachment, the plaintiff must allege and prove much the same that he would in a suit for a malicious prosecution—that is, want

officer may lawfully take possession of boxes left at a depot for transportation, and open them, and separate what he chooses to attach, yet he must exercise his authority in a reasonable manner. If he remove boxes unnecessarily, or take therefrom property which is exempt from attachment, he will be liable as a trespasser, and the owner will be entitled to recover for the damage sustained by the removal of the boxes, and also the value of any articles actually retained by the officer which are protected from attachment by law.¹

§ 490. An officer, in bidding off property, cannot lawfully act as the agent of the creditor, for the reason that the officer should be impartial, and that an agency for one of the parties would imply an interest adverse to the other. Neither can a person, in seizing personal property in the possession of A., be permitted to act ostensibly in the character of sheriff, by virtue of an execution against A. at the suit of B., and, after thus effecting his purpose, throw off his official character, and aver that he took the property as belonging to C., and as the private agent of the real owner. To permit this would be to expose the possession by the party of a contested chattel to be changed and transferred to his antagonist, by the interference of any sheriff or constable, who, by a prostitution of his official power, and in the practice of a falsehood, might choose to lend himself to the execution of such a scheme.²

§ 491. Although it is a general rule that a mere non-feasance will not make an officer a trespasser *ab initio*,* yet,

of probable cause and malice express. The party, ordinarily, will be the only one liable (*Abbott v. Kimball*, 19 Vt. 551, per Redfield, J.)

¹ *Peeler v. Stebbins*, 26 Vt. 644.

² *Knight v. Herrin*, 48 Maine, 533; *Payson v. Hall*, 30 Ib. 319; *Pierce v. Benjamin*, 14 Pick. 356.

* *Waterbury agst. Lockwood*, 4 Day, 257, was an action against a tax collector for seizing and selling a horse and other property under a warrant for the non-payment of taxes. A verdict having been found for the defendant in the court below, a point made, on a motion for a new trial, was that the court improperly admitted in evidence the warrant in the hands of the defendant and his indorsement thereon, showing that he took the horse, &c., by virtue of the

in some cases, an officer may, by mere nonfeasance, forfeit the protection of the process under which he acts, and become

warrant, and advertised the same for sale, &c. To the admission of this evidence it was objected that it afforded no justification, because the history of the subsequent proceedings of the officer therein detailed showed such irregularity of conduct and neglect of duty, attended with a loss of the property, as rendered him still liable to the plaintiff's demand as a trespasser *ab initio*, and, of course, could not avail him as a defense. The Supreme Court said: "An omission or neglect of duty is not sufficient. The action of trespass cannot be supported where no trespass has been committed; yet, in some cases, an act in itself lawful may, in consequence of another act, by relation, become a trespass; but, in all such cases, the subsequent act must be an act of trespass, and committed before action brought. In this case no such subsequent act of trespass appears. At most, the conduct of the defendant is a neglect of that care and diligence which the law required of him; and, though such neglect may make him liable in a proper action, it cannot make him liable in this. There is nothing on the return showing either an abuse of the power given by law to the defendant as collector, nor any actual trespass by him committed on the property taken, which can, by relation, make him a trespasser from the beginning. I am, therefore, clearly of opinion that the warrant and return were admissible to show that the taking was lawful; and that, at the date and service of the plaintiff's writ, no trespass had been committed by the defendant. They furnish *prima facie* evidence of these facts, and a justification to that time, and if not rebutted, must produce a verdict in favor of the defendant."

Walker v. Lovell, 8 Fost. 138, was an action of trespass against a deputy sheriff for attaching and selling certain personal property belonging to one Calvin Walker, on a writ against him in favor of Hall & Co., who were creditors of said Calvin for goods sold and delivered. A portion of the goods sold by Hall & Co. were spirituous liquors, the sale of which was illegal. The defendant applied the proceeds of the property in question to the satisfaction of the judgment obtained by Hall & Co. against said Calvin. The amount received by the defendant from the sale was more than sufficient to satisfy so much of the debt and interest thereon as accrued from the other articles than the said spirituous liquors, and all the costs of suit and fees and charges of the officer. It was contended on the part of the plaintiff that inasmuch as it appeared that the avails of the goods attached and sold upon the writ amounted to a greater sum than the amount of the debt justly and legally due to Hall & Co., and the legal costs, and that the defendant applied the entire sum of the avails realized from the sale upon the execution issued upon their judgment against said Calvin, the defendant thereby became a trespasser *ab initio*, and was answerable for the entire property originally attached. It was, however, held that the action could not be maintained. The court said: "The officer was undoubtedly obliged to apply the money to the extent of the sum justly due and the costs of the action. But if this form of action can be sustained, on the ground that the defendant is a trespasser *ab initio*, he is answerable as for a wrong in attaching the property originally, and for every other act touching it that was injurious to the plaintiff. But we are of opinion that the defendant is under no such liability as a trespasser. If he is liable to the plaintiff at all, the liability resting on him is only that of an officer who, having sold the property of a judgment debtor, from which a larger amount has been realized than is required to answer the just and proper purposes of the sale, is responsible for the excess to the debtor. The application of the money upon the execution was, at most, a mere exercise of an erroneous judgment of the officer, in reference to his duty and rights, and was wholly unattended with anything like a wrong with force. It was no more than a mere non-feasance as to this plaintiff. It was not more than the omission to pay over to the plaintiff the surplus money remaining in his hands, after discharging that portion of the execution which was justly and legally due. There was no destruction or waste of the property or the money by this act of the defendant. Notwithstanding the application of the money, by way of indorsement on the

liable to be treated as a trespasser, although his conduct was in the first instance lawful. Thus, it has been held that if he neglect to return *mesne* process, he shall not be permitted to use it as a justification of any act he may have done under it. This principle, which may be considered as an exception to the general rule, was adopted in England in very early times, the ground being that if there were no return of the process, it was the same in effect as if there was no process.^{1*} But in order to render an officer liable as a trespasser for a mere act of nonfeasance, he must omit to do something, without which he is precluded from showing that the original act of taking was lawful.² *Russell v. Hanscomb*³ was an action for taking and carrying away a seine. It appeared that the defendant was a fishwarden, and that he seized the seine acting in that capacity. The defendant had the seine appraised, without notice to the plaintiff, and without process of law as required by the statute; and it was held that such neglect made him a trespasser *ab initio*, and liable to an action by the owner of the net for its value. It was analogous to the case of a sheriff attaching the property on

execution, in point of law, it is still in the hands of the defendant for the plaintiff's use" (citing *Gates v. Gates*, 15 Mass. 310; *Abbott v. Kimball*, 19 Vt. 551).

¹ *Rowland v. Veale*, Cowp. 18; *Freeman v. Blewitt*, 1 Salk. 409; *Cheasley v. Barnes*, 10 East, 73; *Jordan v. Gallup*, 16 Conn. 543; *Williams v. Ives*, 25 Ib. 568; *Parker v. Pattee*, 4 N. Hamp. 530; *Barrett v. White*, 3 N. Hamp. 210; *ante*, § 353.

² *Williams v. Ives*, *supra*; *Stoughton v. Mott*, 25 Vt. 668; *Stone v. Knapp*, 29 Ib. 501; *Gardner v. Campbell*, 15 Johns. 401; *Ferrin v. Symonds*, 11 N. H. 363; *Bailey v. Hall*, 16 Maine, 408.

³ 15 Gray, 166.

* "A rule that a sheriff shall forfeit the protection of process by not returning it can rarely have any practical application in our system of jurisprudence" (*Richardson, C. J.*, in *Parker v. Pattee*, *supra*).

We have met with no case in which it has ever been held that an officer may become a trespasser *ab initio* merely by an omission or mistake in his return. When various articles are attached, the officer may inadvertently omit to mention a particular article, or may, by mistake, give a wrong name to an article. Some articles may be released by the creditor at the request of the debtor, and be on this account omitted in the return. There is no reason why, in any of these cases, the officer should be treated as a trespasser. If he unlawfully convert the goods to his own use, or suffer them to be lost, wasted, or injured, by his negligence, he makes himself liable to the extent of the injury. But it seems not to have been decided that an officer is liable in any shape for a mere defect in his return.

mesne process, or seizing it on execution, and not returning his process. And where an officer, having lawfully seized goods, neglected to procure a warrant within the time required by the statute, it was held that the detention of the goods after that time being wrongful, the officer was liable.¹ The neglect of an officer to pay over money in his hands to one entitled to it, on demand, is not only an act of nonfeasance, but also of misfeasance, for which the officer is liable as a trespasser.² But a statute which makes it the duty of an officer who has an execution, to call at the debtor's dwelling-house for payment before levy, is merely directory, and the neglect to do so does not render the levy a trespass.^{3 *}

§ 492. According to the modern English cases, to implicate one as a trespasser *ab initio*, he must do or consent to some act which goes to show that the original taking was

¹ Stoughton v. Mott, 13 Vt. 175; Tubbs v. Tukey, 3 Cush. 438.

² Norton v. Nye, 56 Maine, 211.

³ Dow v. Smith, 6 Vt. 519; and see Eastman v. Curtis, 4 Ib. 616.

* In Dow v. Smith, *supra*, the court said: "The plaintiff insists that the performance of this is a condition precedent to the officer's power to levy, and that without it his levy is a trespass. Such a principle is incapable of practical adoption. If he cannot take the property, though he finds it, until he has first been to the debtor's abode, it is obvious that the property may be then entirely beyond his bailiwick. Cannot property be charged in execution which the officer holds on attachment until the debtor is first visited? May an officer, holding an attachment, take property, when one having final process cannot? Is it to be endured that an officer must see a debtor in execution escape from the county because the officer has not been to the debtor's house with his execution? For it is as necessary in the latter as in the former case. But perhaps it may be said that the officer might, in his return, state an excuse for not going to the debtor's abode. This would compel the officer to judge of the excuse at the peril of being held a trespasser if the court should not confirm his judgment, or of never venturing an excuse, and hazard being answerable to the creditor. The only practicable course is to treat the officer's proceedings as good; and if his disregard of this directory statute is without excuse, malicious, and productive of injury to the debtor, let redress be had by an action on the case therefor against him. Such has been the practical construction of this statute ever since its adoption. If this levy is void and a trespass, so must have been a levy on land."

The refusal of an officer to take bail on *mesne process* will not render him a trespasser, it being a *nonfeasance*, not a *malfeasance* (Churchill v. Churchill, 12 Vt. 661).

When the nonfeasance is permitted or suffered by a deputy sheriff, the action should be against the sheriff and not the deputy, and the creditor is not liable for it unless done by his command or assent (Hale v. Huntley, 21 Vt. 147, referring to Abbott v. Kimball, 19 Vt. 551).

with the purpose of putting the thing to an illegal use. These decisions rest upon the avowed ground of narrowing to the utmost the doctrine of making officers and others trespassers by means of some technical irregularity in the detail of their duties.¹ In a case in Illinois, it was said that there must have been "such a wrongful act as leads to the belief that the legal authority was only resorted to in order to enable the officer to obtain the means of committing the wrong."² * Where a deputy sheriff, acting in his official capacity, entered upon the close of the plaintiff and took and carried away therefrom a wagon and two sleighs, the property of the plaintiff, and left them in a safe and proper place, and afterwards the wagon and one of the sleighs were maliciously destroyed by some person unknown, it was held that the officer did not thereby become a trespasser *ab initio*, nor liable as such, in trespass for the original entry. As he was not guilty either of negligence, or of any forcible and positive act of trespass in reference to the property attached, he could not be presumed to have acted, in entering upon

¹ See *Hyde v. Cooper*, 26 Vt. 552; *Bean v. Hubbard*, 4 Cush. 85.

² *Page v. De Puy*, 40 Ill. 506.

* Substantially the same ground was taken by the Supreme Court of Vermont, in *Stoughton v. Mott*, 25 Vt. R. 668, which was an action of trespass to recover the value of the plaintiff's sloop. It appeared that the vessel had been seized by a United States officer for carrying contraband freight, and that the defendant, a U. S. deputy collector, the sloop being in charge of U. S. soldiers under the officer, assisted in unloading the sloop, and that afterward the vessel, while in charge of the soldiers, was wrecked in a gale on Lake Champlain. It was held that the defendant's agency in the transaction was insufficient to make him a trespasser. Redfield, Ch. J., in delivering the opinion of the court, said: "I have found it impossible to discover the least scintilla of evidence tending in the remotest degree to implicate the defendant in any positive wrongful act. If it should be assumed that he, having participated in the seizure, was bound to see to it that the vessel or goods were regularly proceeded with under the act of Congress, and properly taken care of in the mean time; yet the non-performance of both these duties, if it be assumed that the law casts them upon the defendant, is but a mere *nonfeasance*, and not sufficient, according to all the cases, to make the defendant a trespasser from the beginning. The plaintiff's only remedy in such a case, for the destruction of his boat through want of ordinary care, would be, perhaps, a special action of trespass on the case, but clearly not trespass."

To make an officer a trespasser *ab initio*, the wrongful act must be done to the property itself, not to the fund realized from a legal sale (*Wilson v. Seavey*, 38 Vt. 231).

Trespass cannot be maintained against a constable for merely taking too much property under an execution, the remedy being trespass on the case (*Jarratt v. Gwathmey*, 5 Blackf. 237).

the close of the plaintiff, without authority, and in his own wrong.¹

§ 493. The general rule is, that he who at first acts with propriety under an authority or license given by law, and afterward abuses it, shall be considered a trespasser from the beginning. The reason of the rule seems to be, that it would be contrary to sound public policy to permit a man to justify himself under a license or authority allowed him by law after he had abused the license or authority thus allowed him, and used it for improper purposes. The presumption of law is, that he who thus abuses such an authority assumed the exercise of it in the first place for the purpose of abusing it. The abuse is, therefore, very justly held to be a forfeiture of all the protection which the law would otherwise give.² The Six Carpenters' Case³ recognizes a distinction between the actual and positive abuse of a thing taken originally by authority of law and a mere nonfeasance, such as a refusal to deliver an article distrained.* It has never been doubted

¹ Ferrin v. Symonds, 11 N. Hamp. 363.

² Hopkins v. Hopkins, 10 Johns. 369; Gardner v. Campbell, 15 Ib. 401.

³ 8 Co. 146.

* Different reasons have been given for the distinction between the consequences of an abuse of an authority in law and the abuse of an authority in fact. What is offered in the Six Carpenters' Case as a reason for the distinction is hardly more than a statement that such a distinction exists. In Allen v. Crofoot, 5 Wend. 506, Savage, C. J., intimates that it is a distinction without a difference of principle. Hammond (Ni. Pr. 59) observes that the reason given by Coke "cannot be the true reason of the rule, because if the nature of the subsequent act of trespass was indicative of a previous evil intent, it must be so in the instance where it has been perpetrated in executing an authority in law, but likewise where it has been committed in fulfilling an authority in fact. The ground, therefore, upon which one who has been guilty of an abuse is made a trespasser *ab initio*, is that of policy, and the rule was instituted to prevent an authority in law being turned into an instrument of injustice and oppression." But where the authority is derived from an individual, and the authority is abused, the party becomes a trespasser for the excess only; "for the necessity and policy which in the instance where an authority in law has been abused, operate to invalidate the proceedings from the commencement, no longer exists" (Hammond's Nisi Prius, 66). The foregoing distinction seems not to have been extended to criminal cases (The State v. Moore, 12 N. Hamp. 42).

The reason of this rule, and why it does not apply equally to an abuse of an authority in fact, does not seem very satisfactorily explained in the books. It is sometimes said that the law intends, from the subsequent tortious act, that there was from the beginning a design of being guilty of an abuse of the authority. At other times, it is made to rest upon the general reasonableness of the rule that, where the law has given an authority it should, in order to secure such per-

that if an officer have legal process to execute, and voluntarily abuse and pervert it to other purposes, he is not only a trespasser in that act, but becomes one *ab initio*, and is thus liable for all that he has done under the process. This rule of the common law applies to all subordinate executive officers, and serves to confine them within the limits of their legal duties.¹ Where a commissioner of streets, being legally authorized to remove a shop from the street as an obstruction, sold fragments of it, it was held that he was thereby guilty of such an abuse of his authority as rendered him a trespasser *ab initio*, and answerable for the value of the building.² The tanning of raw hides seized as a distress, has been held to make him who seized them a trespasser, because they are so changed by the operation as not to be known by the owner. So, likewise, where a searcher seized certain stuffs and unpacked them, and placed them in the dirt, by which they were injured, it was held, that although the

sons as are the objects of the authority from the abuse thereof, make everything done void when it is abused, and leave the abuser in the same situation as if he had done everything without any authority. But whatever may be the reason of the rule, it is founded, in some measure, in fiction.

Where in action of replevin the defendant justifies the taking as a distress, the plaintiff may reply that the defendant so abused the distress as to render himself a trespasser from the beginning. In *Hopkins v. Hopkins*, 10 Johns. 369, Kent, Ch. J., delivering the opinion of the court, said: "There is no reason why the general principle should not apply to this action as well as to trespass, that where a person acts under an authority or license given by law, and abuses it, he shall be deemed a trespasser *ab initio*. The party recovers his damages in this action as well as in trespass, and the law would be inconsistent in holding in the action of *replevin* that the original taking was valid, notwithstanding any subsequent abuse, and awarding a return, and yet in the action of trespass to punish the party for the first taking. There is no color for such a distinction in the *Six Carpenters' Case*, 8 Co. 146, where all the law on the subject is fully discussed and clearly expounded. It is there declared, that 'if the owner, who distraineth for *damage feasant*, doth work or kill the distress, the law will adjudge that he entered for that purpose, and because the act which doth demonstrate the same is a trespass, he shall be a trespasser *ab initio*.' But the court proceed to state and illustrate the cases in which the party is not to be adjudged a trespasser *ab initio*; as, if a man take cattle *damage feasant*, and the other tender sufficient amends, and he refuses to deliver them back, if he sue a replevin he shall recover damages only for the detention, and not for the taking, *for that was lawful*." The necessary inference from the language of the case is, that in the first instance put the person taking and abusing the beasts would, on a *replevin*, be deemed a trespasser from the beginning.

¹ Bacon's Abr. Trespass, B; Ross v. Philbrick, 39 Maine, 29; Allen v. Crofoot, 5 Wend. 506; Malcom v. Spoor, 12 Metc. 279.

² Mussey v. Cummings, 34 Maine, 74.

search was lawful, yet that the placing of the goods in the dirt was such an abuse of his authority as to render him a trespasser *ab initio*.¹ An error or mistake, however, such as a person of ordinary care and common intelligence might commit, will not amount to an abuse. There must have been such a complete departure from the line of duty, or such an improper and illegal exercise of the authority to the prejudice of another—such an active and wilful wrong perpetrated—as will warrant the conclusion that its perpetrator intended from the first to do wrong, and to use his legal authority as a cover for his illegal conduct.² The taking an excessive distress, and the removal of goods taken by warrant of distress to a great distance, though wrongs, are not such acts as will warrant the conclusion that the persons committing them intended from the beginning to abuse their authority, and, therefore, do not make the persons committing them trespassers *ab initio*.³ But it is said that when six ounces of gold and one hundred ounces of silver were taken for six shillings and eight pence, it was holden to be an excessive distress for which the party was liable in trespass; because that appeared upon the face of it, to be excessive, and because it was a distress of gold and silver, which are of certain known value, and the measure of the value of other things.⁴ *

§ 494. When a person who has authority by law to enter a house to serve legal process, places there an unfit and unsuitable person to keep possession of goods which he has attached until he can remove them, against the remonstrance of the occupant of the house, it is such an abuse of his au-

¹ Rolle's Abr. 561.

² Taylor v. Jones, 42 N. Hamp. 25.

³ Purrington v. Loring, 7 Mass. 388.

⁴ 1 Burr. 590; Barrett v. White, 3 N. Hamp. 210.

* In Purrington v. Loring *supra*, which was an action of trespass for taking and carrying away the goods of the plaintiff, the defendant pleaded that as a deputy sheriff he, on warrants of distress against the plaintiff, duly issued and delivered to him to execute, took, carried away and sold, to satisfy those warrants, the chattels mentioned in the declaration. It was admitted that the goods were removed to, and advertised and sold in an adjoining town; but it was held that the officer by so doing did not become a trespasser *ab initio*.

thority as renders him liable as a trespasser *ab initio*. In *Malcom v. Spoor*,¹ it appeared that the defendant, who was a constable, entered the plaintiff's house and attached her furniture, and that he took with him into the house, and left in charge of the furniture, a man who was drunk, although the plaintiff objected to the man's remaining in the house on account of his intoxication. At the trial in the Court of Common Pleas, the judge charged the jury that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, it was such an abuse of his authority as made him a trespasser *ab initio*, and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict having been found for the plaintiff pursuant to the foregoing instructions, the Supreme Court refused to disturb it. Where an officer places personal property in charge of a third person to keep, and such person uses it, the officer has been deemed a trespasser *ab initio*, although done without his knowledge, the use of the property being regarded as really an abuse of the process as to destroy or sell it without authority.² But in New Hampshire it has been held that the conversion of goods by a person with whom an officer has deposited them for safe keeping, without the knowledge or assent of the officer, does not make him a joint trespasser with such person.³ *

¹ 12 Metc. 279.

² *Briggs v. Gleason*, 29 Vt. 78; *Morris v. Hyde*, 8 Ib. 352.

³ *Barron v. Cobleigh*, 11 N. Hamp. 557.

* In *Briggs v. Gleason*, *supra*, it appeared that the defendant, a deputy sheriff, attached a mare belonging to the plaintiff, put her in charge of a farmer named Freeman, who worked her cruelly. The court said: "The first inquiry is, whether the use of the property, under the circumstances, made the officer a trespasser *ab initio*. If the use had been by the defendant himself, or by his express consent, or with his knowledge, and he made no effort to hinder it, it has been held by this court in *Lamb v. Day et al.*, 8 Vt. 407, that he thereby became a trespasser *ab initio*. The only difference between that case and this is, that here the use was by the bailee of the defendant, and it does not appear whether with the defendant's knowledge or not. But we think this use must be regarded as the act of the defendant. The bailment is not official in any such sense as to excuse the defendant for the acts of the bailee. If the bailee destroy

§ 495. A person against whose property and rights no excess or abuse has been committed, cannot rely on a wrong or injury done to another as evidence of an original unlawful act toward him, and thus convert an officer exercising a lawful authority into a trespasser *ab initio*. Where, therefore, an officer after selling more than enough of the personal property of a judgment debtor to satisfy the execution, proceeded to sell a mow of hay, it was held that he did not thereby become liable as a trespasser *ab initio* to one who held an unrecorded mortgage of the property.¹*

the property, it is well settled in practice, and by the decisions of the courts, that the officer is liable. And we do not see why the same rule does not apply to any abuse of the property. Indeed, it has been held that, if the bailee of property, under such circumstances, suffer the property to go back into the hands of the debtor, the officer's lien is lost, thus making the act of such bailee that of the officer. We do not intend to decide that every use of property attached for the shortest time, and which may be, through inadvertence, or only for the health of the animal, will make the officer a trespasser. But any such use as is calculated to lessen the value and expose the life and health of the animal, and which is done understandingly and perseveringly, must be regarded as an intentional misuse of the process, and is such an abuse as shows fairly enough that the process is perverted to the accomplishment of other purposes than the legitimate one which the process was intended to justify. To hold that the process is any protection in such case is an evasion and abuse of the law. The whole proceeding under the process is justly regarded as mere finesse, and the shield of its protection is wholly withdrawn, and the officer stands a naked trespasser from the beginning, the same precisely as if he had never had any process." Where an officer places personal property which he has attached in charge of a third person to keep, the officer is liable for the value of the property, and if compelled to pay the whole amount of the debt he will be subrogated to the right of the creditor, and may enforce the execution against the debtor (Briggs v. Gleason, *supra*).

¹ Wolcott v. Root, 2 Allen, 194.

* "The duty of the sheriff to inquire and determine whether the defendant is an absolute owner, or has only a special and limited interest, is exactly the same in the case of a mortgage as in that of a pledge or of a partnership. A pledge may be a cover for fraud as well as a mortgage; the asserted partnership may not exist, or may not embrace the goods in question. The sheriff, however, in proclaiming the fact that a title is asserted by a third person, to which that of the defendant in the execution is subordinate, and in selling the property subject to this claim, determines nothing as to its validity. He merely pursues the course which the law judges to be necessary for the protection of rights and interests which might otherwise be sacrificed or endangered. He cannot say that a mortgage duly filed is a valid security, but he cannot treat it as not existing. He has no right to say that it is invalid by selling the property which it embraces as belonging absolutely to the judgment debtor; it is at his own peril that he thus conducts the sale. As embracing a denial of the title of the mortgagee, it is an invasion of his rights for which the law gives him an appropriate remedy. When the mortgage is valid, the sheriff is as much a trespasser and wrong-doer as if the judgment debtor had no interest in the property" (Hull v. Carnley, 2 Duer, 99, Duer, J.).

Where a demand by a mortgagee of goods upon an officer who had seized

§ 496. In certain exceptional cases, an officer is permitted to seize personal property without process. Public officers are not, however, at liberty to disregard the rights of an individual in reference to his property, unless there is a clear and urgent reason therefor to subserve an important and pressing public necessity. Any other rule would fail to furnish adequate protection to the citizen against the encroachments of superior power.¹ *Sailly v. Smith*² was an action of trespass against the collector of customs for seizing certain dry goods belonging to the plaintiff, under the authority of the 8th section of the act of Congress "to interdict commercial intercourse between the United States, Great Britain and France, and their dependencies, and for other purposes." The goods were taken by the collector, without a warrant, out of a sleigh standing under an open shed; and it was held that he had a right to make the seizure and to retain the goods in his custody until it could be ascertained by due course of law whether or not they were forfeited. Where a custom house officer took by force from under the arm of a passenger landing from a vessel a portfolio containing school drawings, without making any previous demand, it was held that, as drawings which had not paid duty were subject to forfeiture, under the statute,³ the officer was not liable in trespass; but (per Lord Denman, C. J.) that he would be liable in such action to the person, unless some attempt were made to conceal the goods.⁴ In *Allen v. Colby*,⁵ which was an action of trespass for taking the plaintiff's wearing apparel, it appeared that the plaintiff, having fled from the State in order

them on execution for the debt of the mortgagor was not made until ten months after the sale, and no good cause shown for not making it sooner, it was held not within a reasonable time so as to give the mortgagee a right of action against the officer (*Brckett v. Bullard*, 12 Metc. 308). What is a reasonable time, on a given state of facts, where there is no positive law fixing the time, is a question of law (*Brckett v. Bullard*, *Supra*; citing *Smith v. Newburyport Marine Ins. Co.*, 4 Mass. 670; *Johnson v. Sumner*, 1 Metc. 172; *Housatonic & Lee Banks v. Martin*, *Ib.* 294; *Legate v. Potter*, *Ib.* 325).

¹ *Hicks v. Dorn*, 54 Barb. 172; s. c. 1 Lansing, 81.

² 11 Johns. 500.

³ 3 and 4 Wm. 4, c. 56.

⁴ *De Gondouin v. Lewis*, 2 P. & D. 283; 10 Ad. & E. 117; 3 Jur. 1168.

⁵ 47 N. Hamp. 544.

to avoid the military draft which had been called for by the President of the United States, the defendants, who were civil officers, took and detained his clothes for the purpose of securing his arrest. A verdict having been found for the defendants in the court below, the Supreme Court declined to disturb it.* But officers who are empowered to make arrests should not be encouraged in meddling unnecessarily with the property of the accused. A loose rule in this respect would be likely to lead to great abuse.

§ 497. It is the right and duty of an officer charged with the execution of a warrant for grand larceny to take into his custody the property described in his warrant, if he finds it on the person, or in the possession of the accused. He has no power under such process to search the house or premises for concealed property. For this purpose, another process is necessary. But he may search the person of the alleged thief, or take into custody the property, if in his possession and pointed out to him as that described in the process. The ends of justice demand that this power should exist, and the common law and its usages have sanctioned its exercise from time immemorial.¹ †

¹ Houghton v. Bachman, 47 Barb. 388.

* In *Allen v. Colby*, *supra*, the court said: "The conduct of the defendants, in their attempts to arrest the plaintiff, is entitled to an indulgent construction. They would be justified in using, and having undertaken this office for the selectmen of Guildhall, they would be bound to use, all reasonable means to arrest the plaintiff; and for this purpose, there can be no doubt, that in circumstances which might be supposed, they would have a right to take his property. If, for instance, he were meditating flight, and had a horse ready saddled to ride away on, or had a boat prepared to convey him across the river in his flight, there could be no question of the officer's right to take the horse or the boat to prevent his escape and accomplish his arrest. Those would doubtless be stronger cases than the present; but each case must be decided on its own circumstances; and whether the officer acted reasonably, discreetly and in good faith, must, in cases of doubt, be inferred from the circumstances, as matter of fact."

† In New York, the statute provides that "when property alleged to have been stolen shall come into the custody of any constable, marshal, sheriff or other person authorized to perform the duties of any such officer, he shall hold the same subject to the order of the officers hereinafter authorized to direct the disposition thereof." "Upon receiving satisfactory proof of the title of any owner of such property, the magistrate who shall take the examination of the person accused of stealing such property, may order the same to be delivered to such owner, on his paying the reasonable and necessary expenses incurred in the preservation of such property, to be certified by such magistrate, which order shall

§ 498. A seizure as prize, though wrongful, is not a trespass, the tort being merged in capture as prize.¹ This has not been doubted since the cases of *Le Caux v. Eden*,² and of *Lindo v. Rodney*.³ In the latter Buller, J., said: "There is a current of authorities from the time of Queen Elizabeth to the present time, all of which agree that the admiralty has jurisdiction, not only of the question of prize or not prize, but of all its consequences." He cites the case of *Rous v. Hazard*, argued in 1749, and, determined by Ch. J. Lee, who held, with the concurrence of the court, that although for taking a ship on the high seas, trespass would lie at common law, yet that when it was taken as prize, though taken wrongfully, though it were acquitted, and though there was no color for the taking, the judge of the admiralty was judge of the damages and costs, as well as of the principal matter; and if such an action were brought in England, and the defendant pleaded not guilty, the plaintiff could not recover. Buller, J., gives the true reason

entitle such owner to demand and receive such property" (3 N. Y. Rev. Stat. 5th ed. p. 1041).

Under the foregoing statute, "if the evidence adduced before the magistrate satisfies him, judicially, that the property has in fact been stolen, and that the claimant is the actual owner, he has authority, in his judicial capacity, to order its delivery to such claimant. The law can no more subject him to an action for this, than for holding the accused for trial, or any other adjudication he may make in the course of the proceedings before him. It is not intended that his order shall have any effect to settle the question of title. The accused is not thereby deprived of his property. He is still at liberty to take any legal steps he may choose to recover the property or its possession from the person to whom it is delivered, and the order of the magistrate would be no estoppel upon the question of title. Its simple and only operation is to dispose of the possession of property already in the custody of the law, leaving the title open to vindication by any party claiming to have it. For the purpose of investigating, discovering and punishing an alleged crime, the law has taken into its own custody the possession of the property which is claimed to have been the subject-matter of the offense; and it provides for the disposition of such custody after the *prima facie* establishment of guilt by a judicial proceeding; and no action will lie against the officer who is called upon to make, and does make, such adjudication. It would lead to a monstrous perversion of justice if, at the close of an examination, the accused, on being held for trial, could rightfully demand the delivery of the property to himself at the peril of a suit against the officer who detained it. The statute has, therefore, provided that, pending the proceedings to investigate and try the alleged offense, the custody of the property alleged to be stolen shall be subject to the order of a judicial tribunal" (*Houghton v. Bachman*, 47 Barb. 388).

¹ *Stoughton v. Taylor*, 2 Paine C. C. 655.

² Dougl. 594.

³ *Ib.* 613, note 1.

why the question of prize or no prize was solely conusable in the admiralty: "Prizes are acquisitions *jure belli*, and the *jus belli* is to be determined by the law of nations, and not by the particular municipal law of any country." * A vessel cannot be said to be captured as prize, unless the act be done *bona fide*, and under a commission at least *prima facie* valid, and where the responsibility of the government, which must be settled according to the law of nations, is involved. In such a case, there is great propriety in sending a party to a court of admiralty jurisdiction for redress. But not so where our own municipal law furnishes the rule by which the claim and rights of the parties must be tested.¹ In trespass for taking a steam vessel, the defendant pleaded that he was an admiral in the Portuguese navy, and that he took the vessel as a lawful prize, which was condemned by the Supreme Tribunal of Marine at Lisbon, and became forfeited to the Queen of Portugal. In other pleas the trespass was justified under the authority of the Queen of Portugal, *jure belli*. Replication that the defendant being a natural born subject of his majesty, in contravention of the foreign enlistment act,² accepted the commission of admiral without the leave and license of the King of England. It was held that the pleas were a conclusive bar to the action, and that the replication was no answer to the pleas.³ †

¹ Hallett v. Novion, 14 Johns. 273.

² 59 Geo. 3, c. 59.

³ Dobree v. Napier, 2 Hodges, 84; 2 Bing. N. C. 782.

* In *Lindo v. Rodney*, *supra*, Lord Mansfield said: "A thing being done on the high seas, does not exclude the jurisdiction of the common law. For seizing, stopping or taking a ship on the high sea, not as prize, an action will lie. But for taking as prize, no action will lie. The nature of the question excludes, not the locality. The same thing was reiterated in *Smart v. Wolfe*, 3 Term R. 344. The same doctrine was recognized by the Court of Appeals of North Carolina, in *Simpson v. Nadeau, Cameron & Norwood*, 115, where one of the points relied on arose from the conduct of the captors after the seizure; and it was contended, that by such after-conduct the defendant became a trespasser *ab initio*.

† In another plea, the defendant averred that the plaintiff had without the leave and license of his majesty, the King of England, equipped the steam vessel for the service of a foreign prince, contrary to the said statute (59 Geo. 3, c. 69), whereby the said vessel was forfeited to his said majesty. It was held that this plea was insufficient, because it showed no authority in the defendant to seize the vessel.

6. *Power and duty of person specially authorized to act officially.*

§ 499. The appointment of a special officer to serve process, is a judicial act which can only be exercised by the authority signing the process. Accordingly, where a justice of the peace signed a blank warrant with a deputation indorsed on it, and the deputation was afterward filled up by a third person, without the direction or knowledge of the justice; and the person thus deputized served the writ by attaching property; it was held that the deputation was void, and that the person thus deputed was a trespasser.¹ * When the action of certain officers is required to do an act, like the making of a public highway, they are not competent to delegate the authority to an inferior officer.²

§ 500. Where a person who is not an officer is specially authorized to serve an execution, he has no authority except that conferred by such deputation, and is entitled to no

¹ Ross v. Fuller, 12 Vt. 265.

² Trustees of the Village of Jordan v. Otis, 37 Barb. 50.

* In an action of trespass for taking and carrying away two horses belonging to the plaintiff, the defendant justified as a constable under an appointment of three justices, pursuant to the following statute: "If any constable chosen shall refuse to serve, it shall be lawful for the inhabitants of the town to supply such vacancy at a special town meeting; and if the town shall not within 15 days next after such refusal, choose another, it shall be lawful for any three justices of the peace residing in or near such town, and they are required, by warrant, under their hands and seals, to appoint every such officer which the town ought to have chosen; and every officer so appointed shall hold his office for so long a time, and have the same powers, and be liable to the same penalties, as if elected." It was held that the appointment made by the justices was a judicial act not traversable in a collateral action, and remained valid until set aside or quashed upon certiorari (Wood v. Peake, 8 Johns. 69). By the court: "It is certainly sufficient to justify the constable. He comes to the office by an appointment regular according to the forms of law, and made by a tribunal having jurisdiction in the case; and he is bound to accept under a penalty. He is not to inquire, at his peril, into the validity of the act. It is sufficient that three justices have authority to make such appointment in the given case. It would be intolerably oppressive to place the constable in the dilemma of subjecting himself to a grievous penalty if he refuses, or of being prosecuted for trespass if he accepts. If two justices only should appoint him, it would then be a case in which no jurisdiction existed, and the appointment would be null and void. The distinction in the books, is between cases where the authority proceeds from a source possessing jurisdiction over the subject-matter, and from one that does not. The ministerial officer can justify in the one case, and not in the other" (See 3 Hill, 249; 5 Denio, 412).

obedience by reason of his being in any public position. He can claim nothing in this respect until he makes his authority known, or until it is known to those with whom he is dealing. When he attempts to take possession of property which the owner informs him does not belong to the judgment debtor, if he would avail himself of the immunities that attach to public officers in the execution of process, he must at once make known his authority, and that he is acting under it. Until he does this, the owner may treat him as a mere trespasser, and protect his property against him.¹ A cartman cannot, on account of his public employment, claim the exemption of a ministerial officer. Where, therefore, a cartman, by the direction of several persons, took goods away from a stable, in which they had been deposited by the agent of the owner, it was held that he was as much a trespasser as those under whose orders he acted.²

7. *Validity of acts of officer de facto.*

§ 501. The principle is well settled that the acts of officers *de facto* are as valid and effectual, when they concern the public or the rights of third persons, as though they were officers *de jure*. An individual coming into office by color of an election or appointment is an officer *de facto*, and his acts in relation to the public or third persons are valid until he is removed, although it be conceded that his election or appointment was illegal. His title shall not be inquired into. The mere claim to be a public officer, and the performance of a single or even a number of acts in that character would not, perhaps, constitute an individual an officer *de facto*. There must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment. In *Wilcox v. Smith*,³ Smith brought against Wilcox an action

¹ *Burton v. Wilkinson*, 18 Vt. 186; *Leach v. Francis*, 41 Ib. 670.

² *Thorp v. Burling*, 11 Johns. 235.

³ 5 Wend. 231.

of trespass *de bonis asportatis* in the Court of Common Pleas, to which the defendant pleaded that he took the goods as a constable under an execution issued in June, 1826, on a judgment against Smith rendered by one Ingersoll, a justice of the peace of the town of Shelby, in the county of Orleans. It was admitted that the execution was regular on its face. The town of Shelby was formerly in Genesee county, but, with several other towns, was erected in 1825 into a separate county called Orleans, after which Ingersoll continued to act as a justice. The plaintiff proved that four justices of the peace for the town of Shelby were appointed in 1825, and that Ingersoll was not one of them. Evidence offered by the defendant to show that, in 1823, Ingersoll was duly sworn into office as a justice of the peace of the county of Genesee, was rejected. The judge charged the jury that, as it was proved that Ingersoll was not appointed a justice of the peace of Orleans county, the process issued by him was void, and did not protect the constable; but the judgment, which was for the plaintiff, was reversed by the Supreme Court.*

8. *Liability of sheriff for illegal acts of deputy.*

§ 502. We have seen¹ that the sheriff is liable *civiliter* for the acts of his deputies done in the usual course of their duties. The deputies are the servants of the sheriff, and all are considered in law but one officer. The liability of the sheriff as a trespasser, for the act of his deputy in taking the

¹ *Ante*, § 50.

* In this case, the Supreme Court said: "There is no direct evidence that Ingersoll came into office under color of an election. But it is shown that he was an acting justice of the town of Shelby, in the county of Genesee, for at least two years before the county of Orleans was erected, in April, 1825; and that he continued to act as such justice in the same town after it became a part of Orleans county, down to December, 1826. This evidence warrants the presumption that he was elected a justice while his town was a part of the county of Genesee, and that he continued to act by virtue of that authority in the county of Orleans; and it has been judicially determined that the transfer of a town from one county to another does not terminate or affect the offices or powers of its magistrates. The proof on the part of the plaintiff, therefore, that Ingersoll had never been appointed a justice of the county of Orleans since its organization, did not, when taken in connection with the other evidence in the case, impeach his title to the office or rebut the *prima facie* evidence, if it is to be considered but *prima facie*, which had been given by the defendant."

goods of one person to satisfy the debt of another, upon execution, has uniformly been held to be law, at least ever since the case of *Ackworth v. Kempe*,¹ where the precise point was expressly adjudged. In *McIntyre v. Trumbull*,² the court went so far as to hold the sheriff liable where the deputy took more fees, in levying an execution, than were allowed by law, whether the sheriff recognized the act of the deputy or not. And the liability of the sheriff for all of the acts of the deputy official in their character, in executing process, has been held to exist, although the sheriff did not know that the deputy had the process.³ There is, however, a class of cases where the plaintiff in the execution has given the deputy some special directions out of the ordinary line of his duty as deputy, which the deputy has followed, in which it has been held that the sheriff was not liable.*

¹ Dougl. 40.

² 7 Johns. 35.

³ *Grinnell v. Phillips*, 1 Mass. 530; *Campbell v. Phelps*, 17 Ib. 244; s. c. 1 Pick. 62; *Tuttle v. Cook*, 15 Wend. 274; *Walden v. Davison*, Ib. 575; *Curtis v. Fay*, 37 Barb. 64; *The People v. Schuyler*, 4 Comst. 173; *Pond v. Leman*, 45 Barb. 152; *Miller v. Baker*, 1 Metc. 27; *Vanderbilt v. The Richmond Turnpike Co.* 2 N. Y. R. 479; *Tower v. Wilson*, 3 Caines, 174, *contra*.

* Where a deputy sheriff attached a horse, and delivered him for safe keeping to a third person, and afterwards another deputy of the same sheriff seized the horse on an execution against the same debtor, while in the custody of the bailee, and sold him, though forbidden so to do by the bailee, it was held that the deputy who made the first attachment might maintain an action of trespass for this injury against the sheriff (*Walker v. Foxcroft*, 2 Maine, 270). Mellen, C. J.: "Another creditor, by placing his writ in the hands of the deputy who made the first attachment, might have caused it to be attached by him subject to the first attachment; and perhaps, if such second writ were placed in the hands of the sheriff himself, the goods might be considered as attached by him subject to the prior attachment made by his deputy. Be this as it may, no act of the sheriff, or any other deputy, can defeat or impair the rights of the first attaching deputy. In the present action, the sheriff is not sued for his own act, but the act of one of his deputies, for which, if wrongful, he is by law liable to the injured party, and the deputy is liable over to him. The reason assigned why trespass *vi et armis* will not lie is, that the possession of the plaintiff is the possession of the sheriff; and that both being in possession, trespass will not lie by one against the other. This seems to be an objection more technical than true in fact, and more refined than solid. Neither the special property nor the possession of the plaintiff is joint or in common with the sheriff; and if it were, that circumstance would furnish an objection as fatal to an action of trover as to an action of trespass. And yet, numerous cases of trover and replevin have been sustained in similar circumstances" (citing 1 Chitty's Pl. 66, 165). In *Walker v. Foxcroft*, *supra*, Mellen, C. J., remarked that the case of *Thompson v. Marsh* (14 Mass. 269) was in all respects exactly like the one before the court, except that the then action was against the sheriff for the deputy's neglect, instead of being against the deputy himself for his own neglect or wrong, and except also that in the case mentioned the action was trover, and in the case at bar the action was trespass.

§ 503. The sheriff is a trespasser for the acts of his deputy, rather by fiction of law for the better security of the party, than from analogy to the principles which constitute joint trespassers generally. He neither does the act himself, nor is present aiding and abetting. Nor is it done by his express order. The deputy is regarded as acting under the command of the law, as much as the sheriff himself would be if the act were done by him. He acts upon each particular precept independently of his master's orders; and he cannot, while he remains in office, be prevented by the sheriff from executing any precept which comes lawfully into his hands. The liability of the sheriff arises from the peculiar relation which exists between him and his deputy, and is imposed by law, in order that he, being always a responsible person, may stand as a substitute for the deputy, when any wrongful act is done.* From the foregoing consideration, it will be perceived that the sheriff and his deputy are not to be considered as joint trespassers in any tort done by the latter alone, so as to subject them either to a joint action, or to give the party injured a right to bring his action against one, after having recovered judgment and sued out execution against the other.^{1†} Where however, there is personal interference

¹ *Campbell v. Phelps*, 1 Pick. 62; *Moulton v. Norton*, 5 Barb. 286; *Cowen & Hill's Notes*, 823; *ante*, § 50.

* In California it has been held that in an action of trespass against a sheriff personally and not as sheriff, the defendant may prove that he was sheriff, and that his deputy, as such, committed the trespass (*Poinsett v. Taylor*, 6 Cal. 78).

Where in an action of trespass against a sheriff for the act of his deputy, the father of the deputy was objected to as a juror, the court in holding him competent, said: "It might, indeed, have been very naturally supposed that, before a release was executed, and while the deputy was liable to the sheriff upon his bond, or while he was liable himself to an action for the alleged trespass, a bias might have been created in his mind by conversations on the subject of the controversy. But such distinctly appears from his own answer not to have been the fact, and it is difficult to imagine any ground for imputing to him any desire that the cause should result one way more than another" (*Seavy v. Dearborn*, 19 N. Hamp. 351).

A judgment for the defendant, in an action against a sheriff's deputy, may be given in evidence by the sheriff in an action afterward brought against him for the same matter (*King v. Chase*, 15 N. Hamp. 9).

† The injured party may, at his election, bring his action directly against the deputy or against the sheriff, and may, in the latter case, charge the wrong generally as committed by the sheriff, and on the trial prove it to have been committed by the deputy, for whose act he is answerable; or, he may in his action

on the part of the sheriff, he and his deputy are liable as joint trespassers, independently of the official relation existing between them.¹

9. *Liability of assessors of taxes.*

§ 504. Formerly in Massachusetts, when property was seized for a tax illegally assessed, an action of trespass would lie against the assessors.² In *Stetson v. Kempton*,³ which was an action of trespass against assessors for an illegal assessment, whereby the plaintiff's carriage and harness were taken and sold, one of the defenses relied upon was, that as the defendants were authorized to make the assessments by vote of the town, they were mere servants or ministerial officers, and ought not to be liable to an action for the performance of an official duty. The court said that the assessors were not obliged to assess an illegal tax; that they were at liberty to exercise their judgment on the subjects for which the money appeared to be voted, and might refuse to cause the collection to be enforced if they deemed the tax illegal; that if they were not liable to an action, it would be difficult to find a remedy; that the constable or collector was not answerable, because he acted in obedience to a warrant under the hands and seals of the assessors, who had jurisdiction over the subject, and authority to assess a tax, and to issue their warrant; that if an action would lie against the town, it could only be for the money actually received into the treasury, which in most cases would be but a partial remedy; and that the assessors must be answerable, or there would be a defect of justice.*

against the sheriff declare specially, alleging the wrong to have been committed by the deputy (*Walker v. Foxcroft*, 2 Maine, 270; *Walker v. Haskell*, 11 Mass. 177; *Nye v. Smith*, *Ib.* 188; *Draper v. Arnold*, 12 *Ib.* 449; *Train v. Wellington*, *Ib.* 495; *Campbell v. Phelps*, 17 *Ib.* 244).

¹ *Waterbury agst. Westervelt*, 9 N. Y. 598.

² *Aгры v. Young*, 11 Mass. 220; *Inglee v. Bosworth*, 5 Pick. 498.

³ 13 Mass. 272.

* In *Stetson v. Kempton*, *supra*, the tax was voted by the town to raise money to repel a threatened invasion during the war between the United States and Great Britain. At a meeting of the inhabitants of the town it was voted

§ 505. The liability of assessors of taxes as trespassers was held, in Massachusetts, to apply to a case where warrants were issued by assessors for several taxes, some of which were illegal, and the officer siezed and sold more goods than were required to pay the taxes which were legal.¹* In

unanimously to raise the tax; but the plaintiff was not present at the meeting. Towns, in relation to their power to raise money and cause it to be assessed and collected, are restricted by the statute of Massachusetts of 1785, ch. 75, to "providing for the poor, for schools, for the support of public worship, and other necessary charges." The tax which was exacted of the plaintiff, must come within the last clause, or it could not be supported. The Supreme Court, in holding that the assessment was illegal, and the plaintiff therefore entitled to recover, said: "The phrase '*necessary charges*' is indeed general; but the very generality of the expression shows that it must have a reasonable limitation. For none will suppose that under this form of expression, every tax would be legal which the town should choose to sanction. The proper construction of the terms must be, that in addition to the money to be raised for the poor, schools, etc., towns might raise such sums as should be necessary to meet the ordinary expenses of the year; such as the payment of such municipal officers as they should be obliged to employ, the support and defense of such actions as they might be parties to, and the expenses they would incur in performing such duties as the laws imposed—as the erection of powder houses, providing ammunition, making and repairing highways and town roads, and other things of a like nature; which are necessary charges, because the effect of a legal discharge of their corporate duty. The erection of public buildings for the accommodation of the inhabitants, such as town houses to assemble in, and market houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term *necessary*; for these may be essential to the comfort and convenience of the citizens. But it cannot be supposed that the building of a theater, a circus, or any other place of mere amusement, at the expense of the town, could be justified under the term *necessary town charges*. Nor could the inhabitants be lawfully taxed for the purpose of raising a statue or a monument, these being matters of taste and not of necessity; unless in populous and wealthy towns they should be thought suitable ornaments to buildings or squares, the raising and maintenance of which are within the duty and care of the governors or officers of such towns. With respect to the defense of any town against the incursions of an enemy in time of war, it is difficult to see any principle upon which that can become a necessary town charge. It is not a corporate duty to defend a town against an enemy. This is properly the duty of the State or government, and is the most essential consideration for the obligation of the citizen to contribute to the general treasury. The government is to protect, and the citizen is to pay. By the Constitution of the United States, this duty is devolved upon the national government; and although it may be impracticable, in so extensive a territory, to furnish competent security to every section or point, yet it does not follow that corporations of limited powers like towns, can take upon themselves the duty, and exact money of their citizens for the execution of it. It cannot be pretended that a town could lawfully tax the inhabitants to raise and maintain a military force for their protection against an enemy. Such a protection, it is obvious, can only be lawfully given by the State, or ruling power; and if that is not adequate, the voluntary exertions or contributions of the inhabitants must supply the deficiency."

¹ Libby v. Burnham, 15 Mass. 144.

* In this case the court said: "If no more property had been taken than was sufficient to satisfy the legal tax, then, perhaps, trespass would not lie, although the warrants for the other taxes had been used at the same time in taking the

Stetson v. Kempton,¹ it was objected that as part of the money composing the tax was raised for legal purposes, the assessment must be considered so far legal as to support the warrant issued by the defendants; otherwise they would be held to pay in damages for money which lawfully belonged to the town. The court, however, remarked that when a part of a tax was illegal, all the proceedings to collect it must be void, as it was impossible to separate and distinguish, so that an act should be in part a trespass and in part innocent; but that whether the damages might not be diminished in proportion to the sum which should appear to be a lawful subject of taxation, might be considered in the inquiry which was still to be had by the jury. In Vermont, where legal taxes were blended and incorporated with an

property. But here the property was avowedly taken as sufficient to satisfy all the warrants, and it was sold under the authority of all. If there was no trespass in the original taking, on account of the legal warrant, yet the proceeding to sell under all was an abuse of authority, and renders those who commanded the act liable, as trespassers, for the whole. If the property taken had been an individual article, in its nature not separable, although of more value, perhaps trespass could not have been maintained. But here two oxen were taken, and they were palpably more than ought to have been taken to satisfy the legal warrant. The collector must, therefore, have acted under a void authority in seizing the oxen; and the defendants, having commanded that act, are chargeable in this action. When the property of a man is taken without lawful authority, he has a right to the value of that property, at the least in damages. A tax is no debt until it is assessed and demanded; and if not legally assessed, it is the same as if never assessed at all. So that to reduce the damages on the ground that the plaintiff owed a part of the money claimed from him, would be unauthorized by legal principles. What, then, is to be done when assessors have neglected their duty or gone beyond their authority? Is the whole tax to be lost? There is no need of this. The tax may be reassessed, or the town may renew their vote to raise the money. And it is better that they should suffer this inconvenience than that the property of the citizen should be taken from him to satisfy arbitrary exactions, limited by no rule but the will of assessors." Where the assessors of a religious society illegally assessed a tax on a person who was not a member of the society, it was held that an action of trespass might be maintained against them therefor (*Gage v. Currier*, 4 Pick. 399).

In *Bangs v. Snow et al.* 1 Mass. 181, a question arose as to the power of a parish to raise by vote a sum of money, and assess it upon the inhabitants, for the purpose of defraying the expense of procuring an act of incorporation. The court were unanimously of the opinion that the parish had no such authority, and refused to hear an argument, saying it was questioning first principles; for that a parish had power, by statute, to raise money only for the purposes expressed by law, and for expenses incident to such purposes. The same doctrine was recognized in a subsequent decision (5 Mass. 547), wherein it was held that the power of raising money in towns and parishes was limited by statute to the objects expressly provided for, and such expenses as are necessarily incident.

¹ 13 Mass. 272.

illegal tax assessed by the selectmen of a town, under a vote of the town, it was held that the whole were uncollectable, and that the selectmen were liable for the full value of the property siezed and sold, without deduction for the legal portion of the taxes. The court remarked that had the illegal portion of the tax been laid and assessed as a distinct tax, there would have been no difficulty in enforcing other taxes lawfully laid. But the tax laid for an object not within the corporate purposes or powers of the town, and which the corporation could not legally impose, being blended in the outset, by the vote creating it, with taxes for legitimate purposes, and so assessed, it was impossible for the court to discriminate between that portion of the tax which could be legally laid and that which could not. Hence, the whole proceeding was declared void, and the whole matter rested where it would have done had no vote been taken imposing a tax for any purpose.¹ In New York, assessors are within the protection accorded to those who act judicially, and are not personally liable for errors or mistakes in the assessment of property, when they have jurisdiction and act within the scope of their authority. But their power, which is limited and special, must be strictly pursued. When they exceed it, they are civilly liable to any person injured thereby. An assessment of a person over whom they had no jurisdiction, or after their power as assessors had ceased, would be a wrongful act, for which they would be responsible in damages to the injured party.²

§ 506. By the statute of Massachusetts of 1823,³ towns are made liable for illegal taxes assessed and collected by their order. But this statute, which exempts assessors from all responsibility for the assessment of any tax upon the inhabitants of any city, town, district, parish, or other religious society, when thereto required by the constituted

¹ Drew v. Davis, 10 Vt. 506.

² Clark v. Norton, 49 N. Y. 243; s. c. 3 Lans. 484; Westfall v. Preston, 49 N. Y. 349.

³ Ch. 138.

authorities thereof, except only for their own integrity and fidelity, does not embrace school districts.¹ In *Taft v. Metcalf*,² which was an action of trespass against the clerk of a school district, it was argued that the assessors were merely ministerial officers, like the collector, and so were bound to assess the tax upon receiving the clerk's certificate. But the court remarked that this ground was not tenable; that assessors were at liberty to exercise their own judgment upon the legality and regularity of the proceedings, and were therefore not obliged to assess an illegal tax.* In Rhode Island, trustees of a school district were held to be trespassers in illegally assessing a school tax which, under their warrant, was levied upon the property of the plaintiff.³ And the same was held in New Hampshire, in relation to a militia captain who issued a warrant for the collection of an illegal fine.⁴ †

§ 507. In Connecticut, where the selectmen of a town make out an illegal rate bill and cause a warrant to be issued thereon, they are liable as trespassers to those whose property is taken under the warrant.⁵ And in New Hampshire, where selectmen taxed an individual who had caused an in-

¹ *Little v. Merrill*, 10 Pick. 543.

² 11 Pick. 456.

³ *Crandall v. James*, 6 R. I. 144.

⁴ *Young v. Hyde*, 14 N. Hamp. 35.

⁵ *Thames Manf. Co. v. Lathrop*, 7 Conn. 550.

* The power given to towns by the statute (of Massachusetts of 1789, ch. 19, § 2) to determine and define the limits of school districts can be executed only by a geographical division of the town for that purpose, and where it is not done, the assessment and collection of the school district tax will be unlawful, and the assessor liable as a trespasser. In *Withington v. Eveleth*, 7 Pick. 106, the committee appointed by authority of the town to determine and define the limits of the districts ran no lines and established no boundaries, but merely mentioned and described the persons of whom the district was composed. They probably intended that the lands occupied by these persons should be included within the district, but their intention was not matter of record, and according to the terms of their report, their limitation was merely personal, and the district would fluctuate with the change of residence of the persons mentioned.

† In *Henry v. Sargeant*, 13 N. Hamp. 321, the suit was brought against the defendants as selectmen. It was an action on the case for the illegal assessment of a tax, the plaintiff having been arrested and imprisoned, and subsequently paying the tax. It was objected that the action should have been trespass, and not case. It was held that the plaintiff had his election: that he might regard the wrongful assessment as the cause of the injury, and declare in case; or he might treat the arrest by the collector as the act of the selectmen, and declare in trespass.

voice to be duly given in, beyond the proportion he would have been liable to pay upon the invoice, and the taxes were collected by distress, it was held that he might maintain trespass for the injury; it being of the same character as if they had assessed and collected upon him and others, a tax beyond the amount authorized by law.^{1*} In New York, the trustees of a common school district are liable in trespass for making an assessment and issuing a warrant for the collection of a tax voted at a district meeting which is not authorized by law.^{2†} They are confined strictly to the authority

¹ Walker v. Cochran, 8 N. Hamp. 166.

² Baker v. Freeman, 9 Wend. 36.

* Where a collector of taxes was furnished a list of taxes which was not properly and legally made, and the selectmen delivered to him a warrant under their hands and seals, directing him to collect the sums mentioned in the list, and in pursuance of such direction the collector seized and carried away the plaintiff's cattle, it was held that the selectmen were liable as trespassers (*Chase v. Sparhawk et al.* 2 Fost. 184; *Woods, J.*: "If the precept was unauthorized and void for want of a sufficient list accompanying it, still, the direction in it was a command of the defendants, and the act which was performed was done in pursuance of it. The mere fact that the warrant in virtue of which the attachment was made was void, and did not duly authorize the act and justify the collector, and even that the collector was not bound to obey the direction in the warrant, cannot protect the defendants against the consequences of the act which they in fact directed to be done. The trespass being committed, both the agent and the person directing it are liable. And, in fact, the defendants should be liable rather than the collector. The omission of duty being on their part, rather than on the part of the collector, the consequences should attend them also. The seizure of the property is properly treated as the ground of the action, and being without legal authority, was a trespass in the collector, and so also in the defendants, by whose order and direction it was made. The plaintiff might well regard the act of the collector as the act of the defendants, as he has done, and declare in trespass against them" (citing *Batchelder v. Whitcher*, 9 N. Hamp. 239; *Henry v. Sargeant*, 13 N. Hamp. 321).

† In *Baker v. Freeman*, *supra*, the court said: "The powers and duties of the trustees being so extensive and exclusive in the management of all the affairs of the district, a correspondent vigilance and attention to the rights of the district should be required from them; and I perceive no greater hardship in holding them responsible for the execution of an illegal resolution or vote proceeding from a district meeting, than in holding a party liable for the execution of process issued by a court without authority. They are not bound to carry into effect such illegal resolutions. The resolutions of such meetings are often passed by the procurement of the trustees, and the trustees are generally looked to as the advisers of all measures in which the interest of the district is concerned. They can at any time call a special meeting of the inhabitants to revise and correct any erroneous or illegal step. For these reasons, I am of opinion that trespass lies against them, in a case like the present. Even if viewed in the character of ministerial officers, I think they would be liable, on the ground that the resolution showed on its face, that it was passed without authority. It raised money to purchase a site for a school house when the district already had one, and which, of course, must have been known to the trustees; and as before remarked, if the trustees acted without authority in respect to one of the votes or resolutions, the whole proceeding is vitiated and void."

conferred upon them by the statute. In issuing a warrant for the collection of a tax, they act as ministerial officers; and where the statute prescribes the form and legal effect of the process, they will be trespassers if they depart from it. The warrant being the only authority of the collector, it will not aid his case that he departed from it and proceeded in a way which would have been legal if the process delivered to him had been in the proper form. When the warrant is void on its face, both the collector and trustees, if they act under it, will be trespassers.¹ Under a statute which required that the trustees of a school district, in making out their tax list should be guided by the last assessment roll of the assessors of the town, after it had been reviewed and finally established, an abstract was taken by the trustees from the assessment roll before it was finally established. A tax list having been made out in conformity therewith, a warrant issued for the collection of the tax, and property sold, the assessment roll was subsequently reduced. It was held that the trustees were answerable as trespassers; but that the tax collector was not liable; the trustees having jurisdiction, and their warrant affording him protection.^{2*}

10. *Liability of collector of taxes.*

§ 508. While courts should give no countenance to

¹ Clark v. Hallock, 16 Wend. 607.

² Alexander v. Hoyt, 7 Wend. 89.

* There is no requirement of law that compels a person to apply for the abatement of a tax that is assessed without authority (Osgood v. Blake, 1 Fost. 550). And where a person whose property has been sold for taxes under a void warrant, or for an illegal tax, gives a receipt for the balance after payment of the tax and expenses, he does not thereby waive the trespass (Westfall v. Preston, 49 N. Y. 349). Where persons acting as assessors have been duly chosen and qualified to execute that office, and the sum assessed has been legally ordered to be assessed, if the assessment be made, and the warrant of collection be issued by them, or a major part of them, in due form of law, and the poll and estate of the party complaining of the assessment be legally taxable, he cannot maintain an action against them as trespassers for any mistake or error in the exercise of their discretion (Dillingham v. Snow, 5 Mass. 547; Little v. Greenleaf, 7 Ib. 236). In Sanford v. Dick (15 Conn. 447), which was an action of trespass for taking certain personal property belonging to the plaintiff for taxes, exceptions taken to the validity of the rate bill proceeded upon the ground that although the officers engaged in the levying of taxes had confined themselves within the limits of their jurisdiction, yet that the taxes laid were all void on account of omissions and mistakes. The court remarked that such a principle was not admissible, and if recognized would make void all the taxes in the State.

frivolous objections on the part of the tax payer, and render all proper aid in carrying out the law, they ought to see that the rights of the citizen are not improperly invaded, or his property taken without authority.¹* Where, in an action against a tax collector for taking and carrying away the plaintiff's cattle, there was no evidence that the defendant took the oath of office as collector, it was held that, as he had no legal authority to seize the plaintiff's goods for taxes, the action must be sustained, though the plaintiff was not entitled to recover the full value of the property taken, but only dam-

¹ Osgood v. Blake, 1 Fost. 550.

* In *Flanders v. Cross*, 10 Cush. 514, the trespass alleged was the entry by the defendant, into the plaintiff's building, under claim of right, as the purchaser of it, at a collector's sale, for taxes. The defendant denied that trespass lay in such a case, because he said that he purchased in good faith of a person authorized to sell, and because he bought of an executive officer acting in pursuance of law. The building was erected by the plaintiff, with permission, on the ground of another person, the plaintiff living in another State. The property was assessed to the plaintiff, by name, as the real estate of a non-resident, and was advertised as such upon the tax not being paid. Afterward, however, the collector changing his views proceeded to sell the building as personal property, and thus it came into the hands of the defendant. It was held that, as the building was sold as personal estate, though not assessed as such, and not susceptible of being so assessed to the plaintiff, the sale was without law and a nullity; that the entry of the defendant on the plaintiff was consequently tortious, and there must be judgment against him for damages. The court said: "Was the property here to be considered as real estate, for the purpose of taxation, or as personal? The language of the statute would seem to make it the former. 'Real estate,' it says, 'shall, for the purpose of taxation, be construed to include all lands within the State, and all buildings and other things erected on, or affixed to the same.' In the case of such property, if there be division of interests as between landlord and tenant, the statute provides the remedy. But there is no power in the collector to divide the property, to levy on the building severed from the land, as divisible parts of the same piece of real estate. On the other hand, certain it is, that such property is or may be personal estate, at least between the landlord and the ground tenant, if they so agree. However, this may be, it was necessary for the town assessors, in the first place, to elect which of the two constructions to adopt. They chose to consider it non-resident real estate, and that election drew after it the necessary consequence of dealing with it as real estate throughout all the process of the collection of the tax. Instead of which, in the sale, the assumed premises of the tax were abandoned, and it was put up as personal estate. If it was personal estate, then it was not taxable in Lawrence. As personalty it was taxable in Manchester where the proprietor of it resided. It is no answer to this to say that the proprietor lived in another State. We tax a ship to the owner in Salem, although the ship never was at Salem; and it cannot be pretended that the assessors of Boston may assess there a ship which happens to be lying at the wharf, or even a bale of goods in store, when the ship or the goods are the property of a merchant of New York. The only exception to the rule, is, where the foreign owner of goods hires or occupies a store, shop, or wharf within the State. But this exception is of no pertinency to the present case" (citing Rev. Sts. of Mass. ch. 7, sects. 2, 8, 10; *Marcy v. Darling*, 8 Pick. 283; *Huckins v. City of Boston*, 4 Cush. 543).

ages commensurate with the injury.¹ And where the statute did not expressly provide that any one should be eligible to the office of collector of a school district except a resident of the district, but there were provisions in the act on the subject from which the fact and propriety of such residence seemed to be implied on the part of the legislature, it was held, that if the electors of the district should confer the appointment upon a non-resident, he would be an officer *de facto*, so that his official acts would not make him a trespasser, although perhaps he might be ousted from his office.²

§ 509. The authority to assess and collect taxes being wholly derived from the statute, the collector must act strictly within its provisions, and there must have been a legal tax to which the party taxed was liable.³ Without a warrant, a tax collector becomes a trespasser as soon as he meddles with the property of a tax payer. There must also be a law authorizing the issuing of a warrant; and some person be appointed to issue it; and it must conform to the statute authorizing it, and be issued by the person designated by law, or it is no protection to the collector.⁴ When the warrant is good on its face, sufficient in point of form, and the assessors have jurisdiction of the subject, the collector is not liable for its due execution. But a warrant bad on its face, furnishes no protection to him.⁵ *Clark v. Bragdon* ⁶ was an action of trespass brought by Wm. Clark, Amos Clark, and John Lamprey, against a collector of taxes for taking and carrying away wood, belonging to the plaintiffs, to satisfy a tax. The entry upon the tax list, which the defendant set forth in his plea, as that under which he took the property, was Wm. Clark "*et all.*" The names of Amos Clark and John Lamprey were not on the list, nor was there any description of them in the warrant, or on the list. The court said: "The description of the plaintiffs on the list,

¹ *Cavis v. Robertson*, 9 N. Hamp. 524.

² *Ring v. Grout*, 7 Wend. 341.

³ *Cloutman v. Pike*, 7 N. Hamp. 209.

⁴ *Pearce v. Torrence*, 2 Grant, 82; *Stephens v. Wilkins*, 6 Barr. 260.

⁵ *Eames v. Johnson*, 4 Allen, 382.

⁶ 37 N. Hamp. 562.

in this case, was entirely insufficient, and the warrant was consequently illegal and void as to them. '*Et all*' may as well mean any other persons as John Lamprey and Amos Clark. Used as it was, it was unintelligible. It gave no description whatever of the plaintiffs, and no authority to take their property; and the warrant afforded no protection to the defendant."

§ 510. If a tax is illegal, for want of power in the town to vote it, as if voted for a purpose wholly foreign to the objects for which towns are created, or for a purpose other than those for which towns are empowered by law to vote and assess a tax, the collector cannot justify the taking of property.¹ And an action of trespass may be maintained against a collector of military fines, who distrains for a fine imposed by a court martial, in a case where it has no jurisdiction.^{2 *}

¹ Briggs v. Whipple, 7 Vt. 15.

² Wise v. Withers, 3 Cranch, 331.

* Suydam v. Keyes, 13 Johns. 444, was an action of trespass for taking four barrels of flour from the mill of the plaintiff in the town of Munroe, Orange county, New York. The defense was a justification by virtue of a warrant under the hands and seals of the trustees of the school district (which included the mills of the plaintiff) for collecting a tax which had been voted by the freeholders and inhabitants of the district, for the purpose of building a school house according to the provisions of the 8th section of the act of New York, by which the freeholders and taxable inhabitants of the district were authorized to vote a tax for that purpose, "*on the resident inhabitants of such district*," and to choose three trustees, who were required to make a rate bill or tax list which should raise the sum voted on all the taxable inhabitants of the district, agreeably to the levy on which the town tax was levied the preceding year, and annex to such tax list or rate bill a warrant to the collector of the district to collect the tax accordingly. In this case, the amount of the tax was regularly voted by the freeholders and inhabitants of the district; and the trustees made out a warrant to the defendant as collector, with a rate bill or tax list annexed, in which the plaintiff was set down as an inhabitant of the district. It was admitted that the plaintiff was not a resident of the district, and the tax was therefore illegally imposed. The main question in the case, was, whether the collector, who executed the warrant, could claim protection under it. Platt, J., in delivering the opinion of the Supreme Court, said: "I incline to the opinion that the collector (as well as the trustees) is a trespasser. The authority of the trustees was special and limited, and in assuming a right to tax the plaintiff, they exceeded the powers vested in them by law. The rule is wisely settled that in such cases, the subordinate officer is bound to see that he acts within the scope of the legal powers of those who command him. Experience has shown that the safety of private rights will not admit of a relaxation of this rule, and the uniform current of English authorities has supported it with jealous caution. The principle is sometimes harsh in its application, but in order to be efficacious and certain, it is necessary that it should be uniform. Lawless power is never

§ 511. The question as to how far a collector of taxes is protected by his warrant, has been decided differently in different States. In New York, in an action against the collector of a school district, for seizing property for a tax under a warrant regular on its face, the plaintiff was not allowed to show that the forms prescribed by law, in organizing the district, had not been observed.¹ * In Massachusetts, some of the cases have intimated that, if the collector has a regular warrant he will be protected.² In *Upton v. Holden*³ it was held that a warrant, legal on its face, issued by commissioners acting under the statute regulating "proceedings for im-

so dangerous as when exerted by public officers according to the forms of law. The remedy for such abuses, ought to be direct and ample. It is, therefore, insufficient to allow an action against the trustees only. They may be insolvent, or beyond the reach of process, while the officer, who is the immediate trespasser, is fully able to respond" (See *Harrison v. Bulcock*, 1 H. Black. 68; *Mayor v. Knowler*, 4 Taunt. 635, cited in the foregoing as analogous).

Henderson v. Brown, 1 Caines, 92, is distinguishable from the foregoing. That was an action of trespass against a collector for levying a distress for a tax on a theater in New York, which had been assessed as a dwelling-house when it ought to have been assessed as land with the theatre upon it. There was no want of jurisdiction or excess of jurisdiction. It was an erroneous and not a void assessment, and therefore the collector was justified.

¹ *Reynolds v. Moore*, 9 Wend. 35; and see *Henderson v. Brown*, 1 Caines, 92; *Suydam v. Keyes*, 13 Johns. 444; *Savacool v. Boughton*, 5 Wend. 170; *Wilcox v. Smith*, 1b. 231; *McCoy v. Curtice*, 9 Ib. 17.

² *Martin v. Mansfield*, 3 Mass. 419; *Stetson v. Kempton*, 13 Ib. 272; *Thaxter v. Jones*, 4 Ib. 570; *Wells v. Battelle*, 11 Ib. 477.

³ 5 Metc. 360.

* *Henderson v. Brown*, *supra*, was an action of trespass for making a distress as collector for a tax. It appeared that the plaintiff was the owner of a theater in the city of New York, and that it was assessed and valued as a dwelling-house under the act of Congress to provide for the valuation of lands and dwelling-houses, and was taxed as such in pursuance of the act to lay and collect a direct tax within the United States. Defendant, for non-payment of the tax, distrained in a regular manner. The theater was conceded not to be a dwelling-house, within the intent of these acts of Congress, and it did not appear that it was ever occupied as such. Held that, as the assessors had jurisdiction over the subject-matter, and their mistake in considering a theater as a dwelling-house was an error of judgment, an action would not lie against the collector (*Thompson, J. and Radcliff, J.*, dissenting).

Where the limits or boundaries of a school district were not sufficiently described in the written order given by a school commissioner to a person to notify the inhabitants of the district of the time and place of holding a school meeting, it was held that it did not render all the acts of the meeting void, so that officers chosen thereat would be liable in an action of trespass for any of their official acts (*Ring v. Grout*, 7 Wend. 341).

Trespass will not lie against a collector of internal revenue for the seizure of goods which it afterward appears were not liable to seizure, if as such collector he had good cause to believe and did believe that the property was forfeited to the United States (*Averil v. Smith*, 17 Wal. 82).

proving meadows," which directed a collector to collect assessments made by them on the proprietors of meadows, would protect the collector in seizing and selling the property of such proprietors pursuant to his warrant, although the commissioners were not authorized to make the assessments. In Vermont, a collector of taxes cannot justify the taking of property merely by showing a regular tax bill and warrant, but must prove that all the previous proceedings were legal.¹ It was held in an early case, in that State, that the collector of a school district tax was liable in trespass for seizing property by virtue of his warrant and rate bill, if the district had no power to grant the tax, or there had been any illegality in voting it, although the rate bill and warrant were regular on their face.² * The same ground had previously been taken by Chipman, C. J., in *Wilcox v. Sherwin*;³ but his associates on the bench did not coincide. His view was, however, adopted in *Bates v. Hazeltine*,⁴ where it was held that the collector of a school district tax must not only show his rate bill and warrant, but also the organization of the district, the appointment of the committee, and the vote laying the tax; and the court remarked that if the tax was not

¹ *Collamer v. Drury*, 16 Vt. 574; *Downing v. Roberts*, 21 Ib. 441.

² *Waters v. Daines*, 4 Vt. 601.

³ 1 D. Chip. 72.

⁴ 1 Vt. 81.

* *Waters v. Daines*, *supra*, was an action for seizing and carrying away the plaintiff's sheep for a school district tax. No objection was made to the warrant and rate bill, on account of any irregularity apparent on their face. But it was urged that the tax was illegal, and that, therefore, the collector was liable. The court said: "The position that a collector of taxes is accountable in an action of trespass, when there is a want of power in the town or district granting the tax, or where there is any illegality in voting the same, has been considered as too well settled to be questioned at this time. Unless such action could be maintained, the person injured would be either without any remedy, or any but one wholly inadequate. No action can be maintained against the corporation, except to recover back the money which they have wrongfully received, and this, it will be seen, would go but little way in compensating a person whose property has been sacrificed by a public sale, or whose body has been imprisoned to compel the payment of a sum of money illegally demanded of him. Every one who is injured in this way, should be permitted to have recourse immediately to the person who takes his property, or imprisons him against his will, to recover such damages as he has sustained, leaving that person, if he fails to make out a justification on account of the illegality of those who set him to work, to obtain his recompense of the community of which he is a member, and as whose officer, and by whose direction, he committed the injury complained of."

legally imposed, the collector had no right to collect it. In New Hampshire, the collector of taxes may justify a seizure of goods, or the arrest of the body under his warrant, without regard to any defect in the previous proceedings of the town or the selectmen. If his own acts are regular, such seizure or arrest must, as to him, be regarded as lawful. In case of an illegal assessment, the remedy is against the selectmen who issue the warrant, and may take the form of trespass for such arrest or seizure. By the statute, the officer is put upon the footing of a sheriff acting under process from a court of competent jurisdiction, which will be a justification, though the process be erroneously issued.¹*

§ 512. It is important to the rights of property, that regulations authorizing the seizure and sale of chattels without the consent of the owner, should be strictly complied with. The common law in no case permitted the immediate sale of a distress; but only after the goods had been kept a reasonable time. What is to be deemed a reasonable time, is a question of law. A distress ought also to be sold for the best price it will bring. It may be sold at private sale, if the full value can be obtained, unless a different mode is provided by statute; otherwise it should be sold at auction, due notice of the time and place being first given.²†

¹ Blanchard v. Goss, 2 N. Hamp. 491; State v. Weed, 21 Ib. 262; Rice v. Wadsworth, 27 Ib. 104; Henry v. Sargeant, 13 Ib. 321; Kelley v. Noyes, 43 Ib. 209; but see Osgood v. Blake, 1 Fost, 550.

² Blake v. Johnson, 1 N. Hamp. 91.

* In Michigan, it has been held that, as the supervisor of taxes cannot notice or except individual cases, but is compelled by law, when the roll has come to him properly certified, to issue a general warrant, unless there be some defect which renders the whole roll void, he cannot be made liable as a trespasser by reason of any errors or defects in the description of real estate on the assessment roll (Clark v. Axford, 5 Mich. 182).

† Where a collector of duties under an act of Congress made a distress and sold the same at less than half the value at auction, in two hours after the seizure, without giving public notice of the time and place of sale, it was held that he had conducted so illegally as to make himself a trespasser *ab initio* (Blake v. Johnson, *supra*). In Massachusetts it has been held that if the collector sell goods for taxes after the expiration of the time prescribed by the statute, he will be a trespasser *ab initio* (Pierce v. Benjamin, 14 Pick. 356). But in New Hampshire, the keeping of goods by a collector beyond the time designated by the statute for their sale, has been deemed a mere non-feasance, for which he will

§ 513. Where the collector purchases at his own sale, the sale is not void, but only voidable at the election of the owner of the goods. In *Pierce v. Benjamin*,¹ the defendant, who was collector of taxes, justified the taking of the goods in question under a warrant from the assessors of the town, and a seizure and sale of the same for the payment of the plaintiff's taxes. It appeared that the defendant was the highest bidder and purchaser at his own auction. The court remarked that this conduct of the defendant was clearly a violation of his official duty; that such a practice would lead to fraud in the publication of notices and the selection of places of sale; that the respective duties of buyer and seller were incompatible with each other, and no person, in whatever capacity he might undertake to act, could rightfully sustain both characters; but that a sale by an officer or other trustee to himself was not absolutely void, the *cestui que trust* having an option to affirm or avoid it, as he should judge most advantageous to himself; and that as the plaintiff had made no election to annul the sale by a demand of the property, or otherwise, before the commencement of the action, it might well be doubted whether upon this ground he could recover.

§ 514. Where the owner of personal property sold for taxes, buys it in at the auction sale himself, and appropriates it to his own use, in an action of trespass brought by the owner against the tax collector for the wrongful taking, the plaintiff will be entitled to recover only what he was compelled to pay for the property; that being the extent of the injury he has sustained in consequence of the act of the de-

not be liable, though he sell afterward (*Factory v. McConihe*, 7 N. Hamp. 309; *Ordway v. Ferrin*, 3 Ib. 69). Where the collector, having seized more goods than sufficient to pay the tax and expenses of sale, after selling enough for that purpose, proceeds further and sells all the rest, he will not thereby become a trespasser *ab initio*, but only liable for so much as was sold in excess of the requirements of law (*Seekins v. Goodale*, 61 Maine, 400. But see *Williamson v. Dow*, 32 Ib. 559).

¹ 14 Pick. 356.

fendant.¹ If he disaffirm the sale, and treat the defendant as a trespasser, he will be concluded by his election, and cannot afterward affirm the proceedings for the purpose of recovering the balance of the purchase money beyond the amount of the tax.²

¹ Hurlburt v. Green, 41 Vt. 490; Baker v. Freeman, 9 Wend. 36.

² Clark v. Hallock, 16 Wend. 607.

CHAPTER IV.

WHO MAY MAINTAIN THE ACTION.

1. General rule.
2. In case of goods taken from officer.
3. Where goods are taken from a servant.
4. In the case of a corporation.
5. Where the goods belonged to a person deceased.
6. Where property is mortgaged.
7. Where the owner has parted with his right of possession.
8. In case of bailment.
9. Where there has been a conditional sale.
10. In case of agency.
11. Tenants in common.
12. Where possession of goods is obtained by fraud.

1. *General rule.*

§ 515. The possessor of personal property may maintain trespass against a mere wrong-doer without showing the extent of his right; possession itself being a sufficient title against all the world except the true owner.¹ Therefore a person who has the possession of goods under a void assignment with the assent of the owner, may maintain an action of trespass against one who takes them without right.² Where in an action for taking and carrying away a chaise and harness, it appeared that the property was obtained by the plaintiffs, who were heirs at law of an estate, by giving in exchange for it another chaise belonging to the estate, and paying the difference in value between them in money of the estate; and that the defendant, a collector of taxes, sold the chaise for a tax which was illegally assessed; it was held

¹ Potter v. Washburn, 13 Vt. 558; Odiorne v. Colley, 2 N. Hamp. 66; Outcalt v. Durling, 1 Dutcher, 448; Armory v. Delamirie, 1 Str. 505; Hoyt v. Gelston, 13 Johns. 141, aff'd on error, lb. 561; Brown v. Ware, 25 Maine, 411; Jones v. M'Neil, 2 Bailey, 466; Harrison v. Davis, 2 Stew. 350; Demick v. Chapman, 11 Johns. 132; Carson v. Prater, 6 Cold. Tenn. 565.

² Barker v. Chase, 24 Maine, 230; Harrison v. Davis, 2 Stew. 350.

that the plaintiffs were entitled to recover. As the tax was illegally assessed, the act of the defendant in taking the property out of the possession of the plaintiffs was wrongful. As against him the possession of the plaintiffs was a sufficient title; and as he had not shown any right to interfere, they were not bound to go beyond the evidence of title which their possession furnished.¹ Where a master in chancery, without jurisdiction or authority, appointed a receiver of goods, but the papers were regularly issued under the seal of the court, it was held that the receiver might defend an action of trespass for the goods.² In an action for shooting and killing a mare, it appeared that the plaintiff took up the mare, which was straying, and kept and worked her a year or more, and it was held that he was entitled to recover; possession, and not title, being the basis of the action.³ A similar decision was rendered in the case of sheep in the custody of a person as estrays.⁴ In an action of trespass for taking and carrying away personal property from the possession of the plaintiff, he described himself as trustee of his wife. It was held that the plaintiff's possession was sufficient to enable him to maintain the action, and that the allegations that he was his wife's trustee, and that the property was hers, might be rejected as surplusage.^{5*}

§ 516. When the property of a bankrupt has become vested in his assignees they may maintain an action for its injury.⁶ If an injury to the person of the bankrupt is the consequence of the injury to the goods, the injury to the latter is the primary and substantial cause of action, and such right

¹ *Pickering v. Coleman*, 12 N. Hamp. 148.

² *Brush v. Blanchard*, 19 Ill. 31.

³ *Boston v. Neat*, 12 Mo. 125.

⁴ *Hendricks v. Decker*, 35 Barb. 298.

⁵ *Limbert v. Fenn*, 32 Conn. 158.

⁶ *Mitchell v. Hughes*, 6 Bing. 689.

* Certain land having been sold by an administrator, the vendee took possession and sowed it with wheat, but finding that he had no title to the land, the contract was rescinded, and he left. The administrator then sold the land to another person, who put a tenant on it. The first purchaser afterward cut the wheat, and the second purchaser carried it away. It was held that the first purchaser by cutting the wheat became possessed of it, and that he could maintain trespass for taking it (*Algood v. Hutchins*, 3 Murph. 496).

of action will pass to the assignees as part of the personal estate.¹ When there is a mixed case of injury to the person and injury to the property, the bankrupt may maintain an action for the personal injury sustained by him, and the assignees another action for the injury done to the property.² If the property remain in the custody of the bankrupt, he may maintain an action for the wrongful taking of it, notwithstanding the assignment. Where a bankrupt alleged in his declaration that the defendant had seized his goods under a false and pretended claim of right; that he was thereby much annoyed and prejudiced in his business, and believed to be insolvent; and that by means of the premises, certain of his lodgers being induced to believe that he was in embarrassed circumstances, and that the defendants were entitled to seize the goods for a debt, quitted the house, and the declaration then claimed special damages, it was held that a plea of the bankruptcy of the plaintiff and of the transfer of the causes of action to the assignees was no answer to the plaintiff's claim.³

§ 517. The mere possessor of goods cannot, however, maintain the action when a paramount right is shown in a third person with whom the defendant connects himself.⁴ *Hammond v. Plimpton*⁵ was an action of trespass for wood. The plaintiff claimed title to the wood by purchase upon an execution against one Parkhurst. The defendant claimed to own the same wood by means of purchase of one Ingraham. It appeared that Ingraham and Parkhurst entered into an agreement for cutting and drawing a quantity of wood. Ingraham was to cut the wood of a particular size, and Parkhurst to pay him a given sum per cord for cutting and drawing, and the contract provided that "Ingraham should own and possess the wood until he was paid for cutting and drawing." The wood having been cut and drawn by Ingraham

¹ *Drake v. Beckham*, 11 M. & W. 315; *Hodgson v. Sidney*, L. R. 1 Exch. 313.

² *Rogers v. Spence*, 12 Cl. & Fin. 700.

³ *Brewer v. Dew*, 11 M. & W. 625.

⁴ *Hutchinson v. Lord*, 1 Wis. 286.

⁵ 30 Vt. 333.

under the contract, and piled near Parkhurst's shop in the highway, it was attached and sold on execution against Parkhurst as his property, and purchased at the sheriff's sale by the plaintiff. After the attachment, and before the sale, the defendant bought the wood of Ingraham, then piled in the highway, but did not remove any part of it until after the sale on the execution, and after that he drew away some twenty-three cords of it. It was held, that as Ingraham had a special property in the wood under his agreement with Parkhurst, and the defendant succeeded to the rights of Ingraham, the plaintiff could not recover.

§ 518. Personal property taken under a valid writ of attachment, being in the custody of the law, the owner cannot maintain trespass *de bonis asportatis* either against the creditor or the officer for attaching the same under a subsequent writ.* In an action of trespass it appeared that an officer had previously taken the goods of the plaintiffs into his custody on a writ of attachment sued out by a stranger against the plaintiffs' assignors. In this the defendant had taken no part, but finding the goods thus in the hands of the officer, under color of right, he placed another writ of attachment against the assignors in the officer's hands, and directed him to hold the goods for the security of his own debt, to be ascertained by judgment. It was held that the defendant, in delivering the writ to the officer, had not inflicted any such injury upon the plaintiffs, nor had the plaintiffs any such possession of the goods as entitled them to maintain the action.¹ †

¹ Hunt v. Pratt, 7 R. I. 283.

* It has been held that it makes no difference in such case whether the property belongs to the debtor or a third person (Ginsberg v. Pohl, 35 Md. 505).

† In Hunt v. Pratt, *supra*, the court said: "At that time the plaintiffs had neither the actual nor constructive possession of their goods, since they were in the hands of the officer, held by him adversely to them, wrongfully, it is true, but under a claim of right. The general property in goods draws to it the possession of them, when unpossessed by others, or possessed by others in right of the general owner. But how in any sense can the owner of goods be said to possess them, when they are actually in the possession of another, who holds them adversely to him under a claim of right? The cases cited to this point by

§ 519. An averment of property in the plaintiff will be maintained by evidence of actual possession coupled with an interest, though the absolute property is in a third party.¹ In an action of trespass against a deputy sheriff for attaching certain machinery and cloths as the property of a woolen manufacturing company, it appeared that the plaintiff had loaned to the company a large sum of money, and that by mutual agreement between the company and the plaintiff, the latter, in order to secure himself for his advances, had taken possession of and operated the factory, carrying on the same business and with the same workmen; it being agreed that he should run the factory at the risk and on account of the corporation, until he was paid. It was held, that the

the plaintiffs found themselves upon the text of Chitty, who in his work on pleading, p. 171, says: 'If a second trespasser takes goods out of the custody of the first trespasser, the owner may support trespass against such second trespasser, his act not being excusable.' The reason given by Chitty is certainly a good one why the owner should maintain an action against the second trespasser, but none whatever why he should maintain trespass. The authority cited by him is *Siderfin*, 438, which contains one of many reports of the well known case of *Wilbraham v. Snow*, 2 Saund. 47. Now the only point decided, or even mentioned by the Court of King's Bench in that case, is, that a sheriff has such a property in goods seized by him in execution, that he may maintain trespass or trover against one who takes and carries them away, and converts them to his own use. *Siderfin's* note, indeed, is: 'If A. takes my goods, and then B. takes them from A., I may have trespass or trover against the one or the other, at my election, although the opinion in *Croke* is that I cannot have trespass against B.' This might well be the opinion in *Croke*, since the law was precisely so settled, as appears by the digests and reports used in those days. But however this may be, in the case at bar the defendant did not stand in the plight of a trespasser upon the officer, nor did he take the goods at all, but simply by delivering his writ to the officer directed him to hold the goods already taken by the officer upon the writ of another for his (the defendant's) security, and this the officer did. Now, if the sheriff, considered as having obtained the goods by trespass, had actually delivered them to the defendant, it is old law, from the Year Books downward, that the receiving of the goods from him by the defendant could not subject the latter to trespass at the suit of the general owner. If the actual receiving of the goods by the defendant from the sheriff, when he knew that the sheriff had obtained them by trespass, would not constitute the defendant a trespasser, provided the trespass was not originally committed to his use, or for his benefit, how much less will the act of the defendant, who finding the officer in the quiet, and as he supposed, lawful possession of the plaintiff's goods, merely directed him, by a writ of attachment, to detain them for the security of his debt against another whose goods he was advised they were. It would be new law indeed if the mere unlawful detainer of goods, or participation in such an act, amounted to that forcible invasion of the owner's possession of them which the law denominates a trespass" (citing *Brooke Abr. Trespass*, pl. 358; *Rolle's Abr. Trespass*, p. 556; 4 Inst. 317; 6 Com. Dig. *Trespass*, 6; *Wilson v. Barker*, 4 Barn. & Adolph. 614; *Wright v. Woolen*, 7 Law Times R. N. S. 73).

¹ *Outcalt v. Durling*, 1 Dutcher, 443.

possession of the plaintiff was coupled with an interest of which he could not be deprived either by the company or any other person, except on the terms expressed in the agreement between him and the company, to wit, the payment of his claim; and that therefore he was entitled to recover.¹ A. having sold to B. 43,000 bricks, to be taken out of an unfinished kiln containing a larger quantity, delivered possession of the brick yard to B., and agreed with him to burn the kiln, which he accordingly did, and then executed to C. a bill of sale of all the bricks in the kiln. It was held, that B. had a right to take the 43,000 bricks, although they were not separated from the residue, and that C. could not maintain trespass against him for such taking. While the actual possession was in B., it did not appear that any possession whatever had been delivered to C.; neither had C. the absolute property in any of the brick until B. had exercised his right of selection.²

§ 520. The person who has the general property in a personal chattel may maintain trespass for the taking of it by a stranger, although he never had the possession in fact; a general property drawing to it a possession.³ In *Bulkley v. Dolbeare*,⁴ A. owned a farm, which he leased for years to B.; and C., while A. was out of the actual possession, without license, cut down trees, and some time after the severance of them from the soil, carried them away. It was held, that trespass *de bonis asportatis* might be maintained by A. against C. The case involved a single proposition, and that was, that the plaintiff having the general property in the trees, which were not in the actual possession of any one at the time of the trespass, the law invested him with a constructive possession, and with the right of maintaining the

¹ *Howe v. Keeler*, 27 Conn. 538.

² *Crofoot v. Bennett*, 2 N. Y. 258.

³ Bro. Abr. Tit. Trespass, pl. 303, 341; Bac. Abr. Trespass, C, 2, 3; Stark. Ev. 1439; *Smith v. Mills*, 1 Term R. 475; *Ward v. Macauley*, 4 Ib. 489; *Gorden v. Harper*, 7 Ib. 9.

⁴ 7 Conn. 232.

action.* So where A. mortgages to B. a shop standing on the land of C., B. may maintain trespass against D., who pulls down the shop and carries it away, although it is unoccupied at the time, and B. never took actual possession.¹

§ 521. The rule is well settled, however, that in order to maintain trespass *de bonis asportatis*, it is essential that the plaintiff have had at the time of the commission of the injury the actual or constructive possession of the goods, or a general or special property in them, and a right to the immediate possession.² This point first came under consideration in New York, in *Putnam v. Wyley*,³ in which the Supreme Court of that State, approving *Ward v. Macauley*,⁴ said: "That case was no more than a recognition of the settled principle that a plaintiff cannot bring trespass for taking a chattel, unless he has the actual or constructive possession *at the time*. He must have such a right as to be entitled to reduce the goods to actual possession when he pleases." In *Ward v. Macauley*, Lord Kenyon said that the distinction between trespass and trover was well settled; the former being founded on possession, the latter on property; and he

¹ *Woodruff v. Halsey*, 8 Pick. 333.

² *Hume v. Tufts*, 6 Blackf. 136; *Cannon v. Kinney*, 3 Scam. 9; *M'Farland v. Smith*, Walker, 172; *Bell v. Monahan*, Dudley, S. C. 38; *Codman v. Freeman*, 3 Cush. 306; *Boise v. Knox*, 10 Metc. 40; *Thurston v. Blanchard*, 22 Pick. 18; *Woodruff v. Halsey*, 8 Pick. 333; *Perkins v. Weston*, 3 Cush. 549; *Bird v. Clark*, 3 Day, 272; *Crenshaw v. Moore*, 10 Geo. 384; *Bulkley v. Dolbeare*, 7 Conn. 32; *Freeman v. Rankins*, 21 Maine, 446; *Staples v. Smith*, 48 Maine, 470; *Walcot v. Pomeroy*, 2 Pick. 121; *Lunt v. Brown*, 1 Shepl. 236; *Brown v. Thomas*, 26 Miss. 335; *Clark v. Carlton*, 1 N. Hamp. 110; *Hanmer v. Wilsey*, 17 Wend. 91; *Dallam v. Fidler*, 6 Watts & Serg. 323; *Heath v. West*, 8 Fost. 101; *Maggridge v. Eveleth*, 9 Metc. 233.

³ 8 Johns. 432; and see *Wilson v. Mackreth*, 3 Burr. 1824; *Smith v. Milles*, 1 T. R. 480.

⁴ 4 Term R. 489; but see *Gordon v. Harper*, 7 Ib. 11.

* Possession and ownership of land from which rails and logs have been wrongfully taken, is *prima facie* evidence of title to them (*Dorcey v. Patterson*, 7 Clarke, Iowa R. 420). A claimant on public land who has left rails piled thereon, when it is entered may sue a person who has taken them by permission of the owner of the land (*Robertson v. Phillips*, 3 Iowa, 220).

Two persons claiming a field, but without either a title or actual possession, raised thereon corn. One of them afterward cut the corn, piled it in heaps, and left it for a week. It was held that he had not thereby such an exclusive possession of the corn as to empower him to maintain an action against the other for removing it (*McGahey v. Moore*, 3 Iredell, 35).

held that as the plaintiff had no possession of the chattels when the supposed trespass was done, his remedy was by action of trover founded on his property in the goods.* In an action against an officer for wrongfully attaching the goods of the plaintiff, it was objected that the instruction to the jury, that to entitle the plaintiff to recover, he must show that at the time of the alleged trespass he held a title to the property, or to some part of it, was incorrect and might mislead the jury, the word title having an indefinite signification. But it was held that there was no ground for such an exception; that a party might have a title to property, although he was not the absolute owner; that if he had the actual or constructive possession of property, or the right of possession, he had a title thereto, notwithstanding another party might be the owner; but that if the plaintiff had not the possession, nor the right of possession, nor the right of property, he certainly could not maintain his action.¹† H. bought what is termed "timber leave," that is

¹ Roberts v. Wentworth, 5 Cush. 192.

* Demand and refusal constitute no foundation for an action of trespass which is a tortious invasion of the possession of another (Imlay v. Sage, 5 Conn. 489, per Peters, J.).

In Root v. Chandler, 10 Wend. 110, the plaintiff lent two horses to Messrs. Rice and Goss, to go east as far as Clarence, but no further. Goss, however, took the horses to Batavia, where they were seized by a constable on an execution against Rice. Shortly afterwards the creditors of Rice, of whom the defendant was one, held a meeting and directed the constable to detain the horses, they agreeing to indemnify him. The constable kept the horses secreted about a week to avoid a replevy, which was threatened by some person other than the plaintiff, and then sold them. It was held that the plaintiff had sufficient possession to maintain trespass, and that the defendant was liable.

In an action against an officer for wrongfully seizing and selling the plaintiff's property under an execution, the person who owned the property at the time of the trespass is properly made plaintiff, though he sold the property before the action was brought (Boynton v. Willard, 10 Pick. 166).

Where, after the goods of A. were attached in a suit against B., A. sold them to C., it was held that A. might maintain an action of trespass against the attaching officer for the benefit of C. (Holly v. Huggeford, 8 Pick. 73). Parker, C. J.: "The property at the time of the assignment was in the custody of the law under an attachment. The plaintiff's right was in action only, and he could not sell so as to enable the vendee to sustain an action. He had a right to carry on the suit in his own name for the benefit of his vendee, and the defendant cannot object to his want of title on this ground."

† Winship *et al.* v. Neale, 10 Gray, 382, was an action for taking and carrying away the plaintiffs' goods. At the trial, in the Superior Court, it was claimed, in behalf of the defendant, that "the plaintiffs had not, at the time of taking by the defendant, the possession of the articles sued for, nor the right to immediate

the right to cut timber and manufacture it into staves, the staves not to be removed from the land until they were paid for. After making the staves, he sold the right to D. No actual delivery of possession by H. to D. was necessary to make the transfer good as against H.'s creditors. All that passed to D., however, was the right, upon payment of the timber leave, to take the staves. The staves having been levied on by the sheriff as the property of H., it was held that as D. had not paid for them, he had neither the possession nor right of possession, and could not maintain trespass for taking them.¹ The owner of lost goods has not such possession as will enable him to maintain trespass for them.² And where a wagon has been made for a person by

possession, and could not therefore maintain the action." The judge, however, charged the jury, that "although such was the law previous to the new practice act, it was not so then; and that it was not necessary for the plaintiffs to have actual possession, or the right to immediate possession, if the jury were satisfied that they were the owners at the time of the taking." A verdict having been found for the plaintiffs, the Supreme Court, in setting it aside, said: "The cause of action set out in the declaration was either in the nature of trespass for wrongfully taking goods belonging to the plaintiffs, or of trover for converting them. In either case it was necessary to show possession, or a right to immediate possession, otherwise the evidence would fail to support the essential allegations in the declaration. The practice act makes no change in the rules of evidence applicable to the various causes of action comprehended under the general designation of actions of tort. The ruling of the court would have been correct if the declaration had been for the wrongful act of the defendant in depriving the plaintiffs of their reversionary right or ownership in the property, subject to the special right or interest therein; but it was erroneous as applied to the cause of action set out in the declaration" (citing *Robinson v. Austin*, 2 Gray, 564).

Where lumber is left by a lessee upon the demised premises at the expiration of his term, he cannot maintain trespass against a subsequent purchaser of the land who is in possession for taking the lumber (*Weitzel v. Marr*, 46 Penn. St. R. 463).

Where land sold or leased remains in the actual possession of the vendor or lessor, no constructive possession of the personal property on it can be raised for the aid of the vendee or lessee against such actual possession, for this would make the constructive possession more potential than the actual and apparent one (*Flanagan v. Wood*, 33 Vt. 332).

So, where the vendor and vendee, or the lessor and lessee remain in the joint possession of the land, the same rule as to change of possession of personalty applies as in the joint possession of personal property alone, viz.: that if the possession of the vendee or lessee is apparently that of a joint owner, and there is no actual and exclusive possession of the personal property by the vendee, the personal property on the land will be deemed to be in their joint possession, and a sale or attachment of it, without removal, will be void (lb. citing *Stephenson v. Clark*, 20 Vt. 624; *Mills v. Warner*, 19 Vt. 609; *Stiles v. Shumway*, 16 Vt. 435; *Parker v. Kendrick*, 29 Vt. 388).

¹ *Creps v. Dunham*, 69 Penn. St. R. 456.

² *Wright v. The State*, 5 Yerg. 154.

agreement, he has not such a title to it as will support an action of trespass until there has been an express or implied delivery and acceptance of the wagon.¹ *

§ 522. The owner's possession of personal property is

¹ Ledbetter v. Blassingame, 31 Ala. 495.

* But where, in an action of trespass for taking and carrying away a desk belonging to the plaintiff, which was being made for him by one Brown, it appeared that the plaintiff furnished part of the materials, and Brown the residue, and that the desk was attached by the defendant, as deputy sheriff, on process against Brown, and taken from Brown's shop when partly constructed, it was held that the property and right to immediate possession being in the plaintiff, he was entitled to a verdict.

Where, in an action of trespass for a quantity of starch, the possession of which the plaintiff claimed by reason of having attached it in the barn of a third person, it appeared that, at the time of the attachment, the plaintiff did not move or take possession of the starch, except by notifying said third person; it was held that the plaintiff had not such property in the starch as to enable him to maintain trespass therefor against one who afterward attached and took possession of the same on other writs of attachment (Blake v. Hatch, 25 Vt. 555).

Carter v. Simpson, 7 Johns. 535, was an action of trespass for destroying a stack of hay belonging to the plaintiff, and tearing down and carrying away the fence around the stack. The plaintiff was allowed to prove his ownership of the hay in a stack on the land of the defendant, by purchase at a constable's sale on execution against one Jarvis, without the production of the execution and judgment under which the sale was made; and the defendant was not allowed to prove that the execution had expired at the time of the sale. The Supreme Court, in reversing the judgment, said: "As the plaintiff below never had possession of the hay, which was on the defendant's ground at the time of the alleged injury, he was bound at least to show a right of property. The proof of a purchase at auction, at a constable's sale, without showing the authority under which the constable acted, was not enough. If the constable had no authority to sell the hay, the vendee had no title. The books have gone so far as to say that a vendee under a lawful judgment and execution shall not lose his property upon a reversal of the judgment by writ of error. But no case admits a title in the purchaser when the sheriff acted without authority" (see 2 Hill, 557; 1 Kernan, 71).

Where the wife's personal property in possession vests absolutely in the husband upon the marriage, for an injury done to it subsequently, she cannot join. In Rawlins v. Rounds, 27 Vt. 17, the declaration averred that the property belonged to the wife, without any averments as to the time of the trespass with reference to the marriage. It was objected, on demurrer, that there was no sufficient allegation of either title or possession in the plaintiffs at the time of the injury. The court, in sustaining the demurrer, said: "In order to render it proper for the wife to join in this action, we must presume this property was the wife's, and taken from her before marriage, nothing of which appears in the declaration. For if the wife earned the property after marriage, and so was, in some sense, the meritorious cause of action, as the books term it, this will not enable her to have a separate property in things personal reduced to possession; but both the property and possession become that of the husband. And a marriage settlement, to enable the wife to hold separate personal property in possession, could only be created by the intervention of trustees, and the legal possession would be in them for her benefit; so that it seems to us altogether impossible to get over this first difficulty, which seems fatal on general demurrer."

constructive, when it is either in the actual custody of no one, but rightfully belongs to himself, or when it is in the care and custody of his servant, agent, or overseer, or in the hands of a bailee for custody, carriage, or other care or service, as a depositary, mandatary, carrier, borrower, or the like, where the bailee or actual possessor has no vested interest or right to the beneficial use or enjoyment of the property, or to retain it in his possession, but the owner may take it into his own hands at pleasure.* Where goods are locked up in a vacant house, of which the owner of the goods is lessee, the owner, although at a distance, is constructively in possession.¹ Standing timber, when sold by the owner of the land and severed from the soil by the vendee, becomes the personal property of the latter, and he may maintain

¹ Bruhl v. Parker, 2 Brevard, 406.

* Of course, where the plaintiff relies upon constructive possession arising by implication of law from the alleged fact that the legal title is in him, unless he can establish his title, he is left without possession, either actual or constructive, and, consequently, without a basis for his action to rest upon. *Howe v. Farrar* (44 Maine, 233) was an action of trespass against a sheriff for attaching certain personal property belonging to the plaintiff on a writ against one Foster. The plaintiff, to prove his title, introduced a mortgage from Foster. The defendant contended that he obtained no title, and, consequently, no constructive possession, by virtue of that mortgage, for the reason that Foster had, before the execution thereof, divested himself of his title to the property by mortgaging it to one Brown; and to show that fact, he offered the Brown mortgage in evidence, which was excluded. The Supreme Court, in granting a new trial, on account of this ruling, said: "How the fact would have turned out had the evidence offered been admitted, we cannot determine. Further investigation might have shown that the Brown mortgage had been paid, or in some way canceled or discharged; in which event, the plaintiff's title and his constructive possession would apparently have been established; or it might have turned out that the mortgage had been foreclosed, and that the title of Brown had become absolute. This would have wholly defeated the plaintiff's right of action, in which event, the defendant could not have been called upon by him to justify his taking. The Brown mortgage was competent testimony tending directly to establish this proposition. Whether it was sufficient, or could have been made sufficient, with other testimony in the power of the defendant to introduce, we cannot determine. It certainly would constitute an important link in a chain of evidence having that legitimate tendency, and for that purpose should have been admitted." In *Howe v. Farrar, supra*, it was objected that the defendant could not avail himself of the Brown mortgage to justify his taking by showing title in some party other than the plaintiff, unless he could connect himself with such outstanding title. To which it was answered that this was undoubtedly true, if the object of such evidence was to justify the taking of the property from the possession of the plaintiff; but that the defendant denied that the possession was in the plaintiff at the time of the alleged taking.

trespass against a wrong-doer for its removal.¹ A., who owned land, sold to B. the right to cut and remove wood therefrom; and B., having cut the wood, left it on the land. Subsequently, C., under a *habere facias possessionem*, issued upon a judgment in ejectment, obtained by default against A., went on the land, and took and carried away the wood cut by B.; and A. afterward established his title to the land and regained possession. It was held that B. was entitled to recover in trespass against C. for the wood taken by him.² But the lien of an execution before levy gives the sheriff no right to maintain trespass for its removal. The sheriff has by his writ only a right to levy, not possession. He is not an owner, but armed merely with a power, and, therefore, before levy, can maintain no action founded upon an injury done to the possession.³ So, likewise, an auctioneer, put into possession of fixtures attached to the freehold, for the purpose of selling them, the purchaser being bound to detach and remove them, has not such a possession as will support trespass for their wrongful removal.⁴

§ 523. The mere delivery of goods to another to keep, with right to resume the possession at any time, will not defeat the action.⁵ A. delivered to B. goods to be sold on commission or returned on demand. C. attached the goods as the property of B. It was held that, as the general property in the goods unsold and the right to their immediate possession remained in A., he could maintain trespass for them.⁶*

¹ *Gambling v. Prince*, 2 N. & M. 138. But see *Waggoner v. Corlew*, Cooke, 246.

² *King v. Baker*, 25 Penn. St. R. 186.

³ *Cluley v. Lockhart*, 59 Penn. St. R. 376.

⁴ *Davis v. Danks*, 3 Exch. 435; 18 L. J. 213.

⁵ *Hart v. Hyde*, 5 Vt. 328; *Thorp v. Burling*, 11 Johns. 285; *Walker v. Wilkinson*, 35 Ala. 725.

⁶ *Shloss v. Cooper*, 27 Vt. 623.

* *Hayward Rubber Co. v. Duncklee* (30 Vt. 29) was an action of trespass for rubber shoes, which had been consigned by the plaintiffs to B. & T., to be sold by them on commission, and which the defendant, a constable, had attached as the property of B. & T. It was proved by one Holton that he was the traveling agent of the plaintiff, and as such agent he had agreed with B. & T. that the rubbers in question should be consigned to them to be sold on a specified com-

The receptor of property attached who delivers it to another, may maintain trespass against one who takes it away, the receptor having the constructive possession of it, and being answerable for it to the person from whom he received it.¹ * So, likewise, one who has goods in the hands of an auctioneer for sale, with the right to resume possession at any time, may maintain an action of trespass against an officer who, with

mission; that the company approved of the arrangement, and the rubbers were sent by him to B. & T., pursuant thereto. The court, before which the trial was had, instructed the jury that, if it appeared that, at the time of the attachment, the plaintiffs were indebted to B. & T. for commissions, B. & T. would have a lien on the rubbers, so that the plaintiffs would not have such a right to possession of the rubbers as to enable them to maintain trespass. But that, if B. & T. had the rubbers under the contract testified to by Holton, and B. & T. had no claim for commissions, and they had not paid the plaintiffs anything for the rubbers which the plaintiffs sent them, the plaintiffs had such a right to the possession of the property in question that trespass was the proper remedy; it being conceded that B. & T. became insolvent a few days before the property was attached by the defendant. The Supreme Court said: "In regard to the plaintiffs' right to maintain trespass, we think the charge was right. The plaintiffs had the general ownership of the goods, and B. & T. had no lien upon them for commissions; and though they had the possession of them under the bailment, with a power of sale, yet, upon the insolvency of B. & T., there was a right in the plaintiffs to immediate and actual possession, and this general right would give a constructive possession" (citing *Chaffee v. Sherman*, 26 Vt. 237). The case of *Skiff v. Solace* (23 Vt. 279) is not analogous to the foregoing. There the plaintiff was not the general owner of the chattels, and of course could not, by means of a special property, have a constructive possession (*Bennett, J., in Hayward Rubber Co. v. Duncklee, supra*).

¹ *Burrows v. Stoddard*, 3 Conn. 160, 431.

* Where, in an action of trespass for taking and carrying away cattle, it appeared that the plaintiff, who was a deputy sheriff, having attached them, removed them into the State of Rhode Island, where he placed them in charge of two persons, taking their receipt, and they delivered them for safe keeping to one P., who lived in Rhode Island, and he kept them until they were taken by the defendants, who had notice of the attachment, it was held that the plaintiff was entitled to recover (*Brownell v. Manchester*, 1 Pick. 232). *Parker, C. J.*: "The inquiry is, whether the special property of the plaintiff was determined on the goods being carried into the State of Rhode Island; and there is no pretense for this, for the officer had the contract of his bailee to redeliver them when they should be wanted; and if they were brought to him when he should want them to satisfy the execution, they would be considered as holden from the time of the attachment. There seems to be no difference, as to the authority of the officer over the goods, between carrying them just over the line of an adjoining State, and carrying them into an adjoining county; for he has as much authority in the one place as the other. Then, supposing them to be in the custody and possession of the plaintiff when taken by the defendants, as they may be legally held to be, the taking was a trespass for which the defendants must be answerable in damages."

Where goods which have been levied upon and left in the custody of the owner are wrongfully taken away, either the sheriff or the owner may maintain trespass therefor; but a recovery by one will bar an action by the other (*Browning v. Skillman*, 4 Zab. 351).

knowledge of the facts, levies upon the goods as the property of a third person.¹ *Williams agst. Lewis*² was an action of trespass for tin ware which the plaintiff had delivered to one Warner, a pedlar, to carry to Farmington, but which Warner took to a different place and sold to the defendant. The court said: "The question of fact in this case is, whether there was a sale of the property by the plaintiff to Warner before it was disposed of to the defendant. If the plaintiff did not sell the property to Warner, the possession of Warner is to be considered the possession of the plaintiff, and is sufficient to enable him to maintain the action." * A. commissioned her brother to buy a cow for her, which he did a fortnight afterward. But, before the cow had either come to A.'s hands or she had assented to the purchase, the cow was taken by the defendant. It was held that A. had such a property in the cow as would enable her to maintain trespass.³

§ 524. Within the rule under consideration, when the owner of a chattel gratuitously permits another person to use it, the owner may maintain trespass for the taking of it while it is being so used.⁴ Accordingly, where a father permitted his daughter to have the use of cows, which, or their increase, continued in her possession several years, it was held, that the father might maintain trespass for taking them, or their young, from the daughter's possession.⁵ † And the same

¹ *Gauche v. Mayer*, 27 Ill. 134.

² 3 Day, 498.

³ *Thomas v. Phillips*, 7 Car. & P. 573.

⁴ *Lotan v. Cross*, 2 Camp. 464; *Root v. Chandler*, 10 Wend. 110.

⁵ *Orser v. Storms*, 9 Cowen, 687.

* *Chaffee v. Sherman* (26 Vt. 237) was an action of trespass for certain goods taken on a writ of attachment against one Lampson. It appeared that the goods were furnished by the plaintiff to Lampson to peddle on commission, the plaintiff reserving the right to retake the goods at any time, and Lampson to return them when he pleased. A sum of money equal in amount to the goods taken by Lampson the first time was deposited by him with the plaintiff as collateral security. After Lampson had sold part of the goods, the plaintiff let him have more goods on the same terms, for which he paid thirty-nine dollars, which only lacked a few dollars of being all that was due for the goods taken at this time. These were the goods which were the subject of the present action. It was held that the plaintiff was entitled to recover the balance unpaid on the second bill of goods, after deducting the thirty-nine dollars and interest.

† Where a father let his daughter have a cow in payment for her work

was held in an action by the owner of a horse taken on an execution against the person to whom the owner lent the horse.¹ *Walcot v. Pomeroy*² was an action of trespass for taking and carrying away household furniture, which was lent by the plaintiff to one Richardson, his brother-in-law. Nothing was agreed to be paid for the use of the furniture, though Richardson testified on the trial that he calculated to pay what was reasonable. The furniture was seized under an attachment sued out by the defendant against Richardson. A verdict was found for the plaintiff in the court below, subject to the opinion of the Supreme Court, which held, that he

family, she being of age, but kept the cow, and afterward, with her consent, sold it and delivered to her the avails of the sale, with which, by her direction, he bought another cow; it was held, that in the absence of fraud in fact, the cow last purchased was not liable to attachment for the debts of the father, though he bought the cow in his own name and, apparently, on his own account, and it had always been in his possession (*Ridout v. Burton*, 27 Vt. 383).

Where a son purchases a farm in order to provide a home for an indigent father, and buys stock and farming implements for it, and the father lives and labors on the farm, the products thereof are not liable to seizure for the father's debts. In *Brown v. Scott*, 7 Vt. 57, it was urged in behalf of the defendant that the father was a tenant to the son, and so became the owner of all the crops on the place, and that the same were subject to be taken for the father's debts. Collamer, J.: "The court will be slow to give to a *bona fide* support furnished by a son to a father such artificial names and technical character as shall, in effect, discourage and frustrate such praiseworthy objects. To create a tenancy there must be some parting with the possession, so as to give exclusive occupancy to the tenant, at least for the time being. Nothing of this kind was shown in this case. The father was suffered to reside there. Now, to hold this a tenancy, and make the crops there the property of the father, would be forcing upon the affair a character never designed by the parties, and evidently at war with their legitimate design. The true object is obvious, and the legal character should be holden by the courts to correspond; that is, the plaintiff is the owner of the farm, stock, tools and crops, and has never parted with possession. He is, by his father, in constructive possession, with the right of taking personal and actual possession at any time. This entitles him to maintain trespass. It appears the plaintiff had said, if more could be raised than was necessary for the father's support, he was willing it should go on his debts. This did not vest the title in the father, or subject it to attachment as his. It does not appear that even enough for the support was raised. Nor do the facts offered by the defendant seem to alter the case, had the proof been admitted. He offered to show that the father had sold off the crops, and had purchased stock on to the farm, for which the son gave his note. This only tended to prove him the agent of the plaintiff, not owner of the property. Had any testimony been offered tending to prove that the purchase money had, in whole or in part, belonged to the father, or that he had been for a long time in exclusive possession, and by valuable labor added greatly to the farm and stock, and was secreting his property from his creditors with his son's assistance, it would have deserved a different consideration and course of proceeding; but the case is destitute of all circumstances of that character."

¹ *Long v. Bledsoe*, 3 J. J. Marsh. 307.

² 2 Pick. 121.

had sufficient possession of the articles to entitle him to maintain the action.* *Staples v. Smith*¹ was an action of trespass for taking a horse alleged to be the property of the plaintiff. It was proved that one Knox sold and delivered the horse to the plaintiff, and at the same time gave him a bill of sale containing these words: "Said Staples, agreeing to let the horse remain in Wm. N. Knox's hands till called for." The defendant justified as an officer under a writ against Knox. It appearing that the horse had not been "called for," it was urged in defense that for that cause this action could not be maintained. But a verdict having been found for the plaintiff, a new trial was refused. *Phillips v. Willard*² was an action against a sheriff for seizing a paper making machine belonging to the plaintiffs. It appeared that the plaintiffs, who lived in Connecticut, had contracted with one Burbank, residing in Worcester, Massachusetts, to construct for him a machine, to be paid for if it worked to Burbank's satisfaction; otherwise, to be taken back. The machine weighed several tons, and it was carted in different parts by Burbank to Worcester, according to agreement. It was set up by the plaintiffs in Burbank's mill, and put in operation for experiment before all the parts had arrived, but it did not work well, and it was immediately thereafter attached by the defendant as the property of Burbank. It was held, that the plaintiff's possession was sufficient to maintain the action.†

¹ 48 Maine, 470.

² 16 Pick. 29.

* In *Walcot v. Pomeroy*, *supra*, the Supreme Court said: "This action may be sustained unless the plaintiff had parted with his right to reclaim the furniture; and it does not appear that he had. If it had been leased to Richardson, so that the plaintiff could not claim it and take possession when he pleased, trespass would not lie for him against the officer or any one else, because he would then have parted with the actual possession, and would not have had a constructive possession. But there does not appear to have been any lease here. There was nothing more than an indulgence; so that if the plaintiff had at any time taken the furniture, Richardson could have maintained no action against him. It is true, Richardson testified that he expected to make the plaintiff a compensation for the use of the furniture. But there was no agreement between them to that effect, and it does not appear that the plaintiff expected to receive any compensation. The plaintiff had a right to the possession, without any demand on Richardson."

† In *Phillips v. Willard*, *supra*, the court said: "The first and most important question in the case relates to the property in the machine. It was a struc-

§ 525. Where a borrower deposits with a lender personal property as security for a loan, the lender having the right

ture of great weight, and could not be finished at their own building, but must have been in the same local situation before as after delivery; and, when completed, no actual, and perhaps no symbolical delivery, would have been necessary. The parts were to be removed by Burbank to his works, but the possession for that purpose was not a delivery. The plaintiff's workmen were to follow the machine to Burbank's land and there complete it, and they accordingly did so, and nearly finished it before the attachment. It was put in operation as an experiment, and operated to some extent, but important parts were wanting to make it work advantageously. The plaintiffs would not have been justified in offering it to Burbank as finished; and if they had refused to complete it, Burbank could not have maintained trover for it, but his remedy would have been on his contract. On the whole, we are all satisfied that the evidence did not show a transfer of the property to Burbank. The other question is, whether an action of trespass will lie for the plaintiffs. The objection on the part of the defendant is, that they had not such possession as will enable them to maintain the action. We have not deemed this point so clear as the main point. The machine was in the building of Burbank, which was in his possession. According to his agreement, however, the plaintiffs had a right to go there to finish the machine, and he could not maintain trespass *quare clausum* against them. We think it was so far within the control and in the possession of the plaintiffs under their contract and the permission of Burbank, that the action will lie. If a watchmaker puts up a clock in a house, under an agreement that if it shall keep good time the owner of the house will purchase it, we think that until the trial is made the watchmaker remains in possession, so as to be able to maintain trespass."

The following cases sustain the principle referred to in the text: In an action of trespass against a deputy sheriff for taking, by virtue of an execution, the plaintiff's only cow, which was exempt from seizure under the statute, it appeared that the cow had been loaned by the plaintiff to one Whitney for the term of a year, and that the defendant, after levying upon the cow, left her in the possession of Whitney until the end of the year, and then drove her away and sold her. It was held, that the asportation of the cow was a fresh trespass, for which the action might well be maintained by the plaintiff, he being then in the constructive possession of the cow (*Keyes v. Howe*, 18 Vt. 411). *Whitcomb v. Tower*, 12 Metc. 487, was an action of trespass against a constable for attaching wool and lambs, the property of the plaintiff, on a writ against Hix and Stafford. It appeared that the plaintiff leased to the latter his farm for one year, and also "certain personal property, to wit, sixty-two sheep, the same sheep to be returned if living, or enough to make the number good, at the end of the year; the wool now growing on the sheep, and the lambs, if any, which the sheep may have this spring, I shall claim to remain my property until the worth of it and them is paid me in money towards the use of the place." The wool and lambs were taken by the defendant before any part of the rent reserved in the lease had been paid. The judge ruled that the plaintiff was entitled to recover the value of the wool and lambs, and the jury, having found accordingly, the Supreme Court refused to disturb the verdict. The court said: "The articles of agreement made between the plaintiff and Hix and Stafford clearly enough indicate the intention of the parties as to the property, and the wool and lambs vesting in the plaintiff until the payment of the rent. The only question is, whether such agreement can legally have the effect intended to be given to it by the parties thereto. We think the present not like the case of *Butterfield v. Baker*, 5 Pick. 522, where an agreement that the future crops should be subject to be taken by the lessor at all times for the payment of any rent that might be in arrear, was held, not to give priority over an attaching creditor; the lessor not having entered upon the premises, and taken possession of the produce under

to sell the property, and after deducting the amount of the loan, to pay the balance to the borrower, and the lender exchanges the property for other property, such other property does not as of course belong to the lender so as to be subject to attachment for his debts, the borrower having an option within a reasonable time to ratify or repudiate the exchange. If the borrower, within a reasonable time, bring an action for the taking of such other property against one who has attached it as the property of the lender, that will be deemed a ratification of the exchange.¹ *

the stipulation that he might do so for rent in arrear. Such entry and taking possession were there necessary to vest the property in the lessor. The present case falls more properly within the principles of the cases of *Lewis v. Lyman*, 22 Pick. 437, and *Barrett v. Pritchard*, 2 Pick. 512. In this case, as in those, the property in the articles in controversy remained in the lessor until the payment of the rent. Under the form of the lease, it required no further act of the lessor to vest in him the property in these articles, and he may therefore hold them, as against an attaching creditor. He had the right of property, and the constructive possession, and may therefore well maintain this action for the wool and lambs" (citing *Smith v. Atkins*, 18 Vt. 461).

¹ *Strong v. Adams*, 30 Vt. 221.

* This was an action of trespass for a wagon which was attached as the property of one Kimball. The plaintiff had pledged a horse and harness to Kimball for the security of twenty-one dollars and fifty cents advanced by him, with the right to sell the property and pay over the balance of the price to the plaintiff. Kimball exchanged the property for a wagon and two dollars and fifty cents in money. The court below held, as matter of law, that this vested the title of the wagon in Kimball, and that it was immediately attachable as his property. Judgment having accordingly been rendered for the defendant, the Supreme Court, in setting it aside, said: "If Kimball exceeded his authority in making the exchange, which, as the facts are stated, would seem to be the case, unless there was something in the evidence or course of dealing to show that Kimball had a larger discretion than an ordinary factor, then it would be optional with the plaintiff either to adopt or repudiate Kimball's act in making the exchange. And his bringing the action is regarded as a sufficient ratification of the act ordinarily, as if he had brought suit to recover his original property it would have been a repudiation of the exchange. What other facts may be put in the case hereafter we cannot anticipate. It will, no doubt, be competent to show, by other evidence, that the plaintiff did repudiate the act of Kimball in making the exchange, or that he did not ratify it in a reasonable time, perhaps. But as there is nothing in this case to show any delay, or that any time intervened between the exchange and the attachment, and as the decision of the court goes upon the ground that the plaintiff had no rights, either absolute or contingent, in the property obtained by the exchange, we think there should be a new trial."

A son has no authority as such to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father, tending to show that he reposed such confidence and intrusted such discretion in the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved of what

§ 526. The purchaser of goods by bill of sale may maintain an action against the vendor for appropriating them, though they were not delivered. *Edwards v. Edwards*¹ was an action of trespass for a hog. The plaintiff introduced in evidence a bill of sale to him of the hog in question, signed by the defendant. It was admitted that at the time of executing the bill of sale the defendant was the owner of the animal, and that he executed and delivered the bill of sale upon sufficient consideration, but did not deliver the hog, and that he soon after killed it for his own use. The only question raised was, whether the bill of sale, without delivery of the hog, vested sufficient title in the plaintiff to enable him under the circumstances to maintain the action. The plaintiff having recovered in the County Court, the judgment was affirmed by the Supreme Court. Where goods are purchased by two persons, it is not necessary to enable them to join in an action of trespass for taking and carrying away the goods that the bill of sale should have been made out to both. If made to one who agreed to purchase for both, both will take, and by bringing the action they show their intent to treat the goods as joint property.*

he had done. But without such proof, the son stands in the same position as a stranger (*Johnson v. Stone*, 40 N. Hamp. 197).

¹ 11 Vt. 587.

* In *Buller's Nisi Prius*, 258, there are two cases cited—*Baker v. Loyd*, before Ch. J. Holt, and *Cowell v. Lane*, before Buller, J.—in which it was held that if a man make a bill of sale to one creditor, and afterwards to another creditor, of the same property, and deliver possession to neither at the time, and afterwards the creditor who has the second bill of sale gets the possession, and the creditor having the first bill of sale subsequently takes the property from him, the latter can maintain no action against the former. The reason given is, that though both bills of sale are fraudulent against creditors, yet both bind the vendor, and the elder title shall prevail.

Kittredge et al. v. Sumner, 11 Pick. 50, was an action of trespass against an officer for wrongfully attaching certain mats, the property of the plaintiffs. It appeared that the plaintiffs and *Hodges & Co.* purchased 20,000 mats, which *Hodges & Co.* agreed to store for six months free of expense to the plaintiffs, they agreeing to pay their proportion of the cost of removing the mats into *Hodges & Co.*'s loft, and the mats were accordingly removed. A few months afterwards a new arrangement was made, and a bill of sale given to the plaintiffs of the whole of the 20,000 mats, they agreeing to pay for their storage until they were fully paid for. At the time of the last contract, and previously, the plaintiffs paid to *Hodges & Co.* various sums amounting to \$1,104 50, which was indorsed on the last bill of sale. The last arrangement was made by *Hodges & Co.* to prevent the mats from being attached by their creditors, but the plaintiffs

§ 527. When goods sold are not present at the time, so as to be actually delivered, and there is no symbolical delivery, and a stranger, or one without legal right, takes the property before the vendee, by exercising ordinary care and diligence, can obtain actual possession of it, the law will protect it for the vendee, and by reasonable intendment will consider the possession to be constructively in the vendee as against such stranger. Accordingly, where in an action of trespass for taking personal property, it appeared that the plaintiff was the *bona fide* purchaser of it on Saturday, and that on Sunday a creditor of the vendor, without any legal right, seized and carried the property away, and so prevented the plaintiff from taking possession of it, it was held that such creditor was a trespasser, and could not purge the original wrong by a subsequent attachment of the property, and that the measure of damages should be the value of the property taken.¹ * Certain goods were consigned to a commis-

had no knowledge of this intent. It was held, that no new delivery was necessary on the second sale, the plaintiffs having at the time an actual or constructive possession of the mats, and that they were entitled to recover. Held, further, that Hodges & Co. had not an attachable interest that could be set up by the officer in defense of the action, citing *Holly v. Huggeford*, 8 Pick. 73.

In an action of trespass for a quantity of hay which the plaintiff, as deputy sheriff, had attached as the property of one Woodman, it appeared that the defendant had purchased a bay of hay in the barn of Woodman, and removed part, and left the residue in the bay in charge of Woodman's hired man. It was held that the plaintiff was entitled to recover, there not having been a sufficient change of possession of the hay to protect it from the attachment (*Sleeper v. Pollard*, 28 Vt. 709).

A. rented his farm and stock to B. by a written agreement, B. to occupy two years, and by way of rent to deliver to A. on the farm one-half of all the crops except such as should be fed to the stock on the place, the crops to be divided by weight and measure. Before any portion of the crops was delivered to A., B. and C. carried them away and consumed them. It was held that A. had not such a title to the crops in the absence of delivery as to enable him to maintain trespass against B. and C. for the taking (*Hurd v. Darling*, 16 Vt. 377).

Where a permit to cut timber is assigned, the assignee may maintain trespass against an officer for attaching the timber after it is cut (*Sawyer v. Wilson*, 61 Maine, 529).

¹ *Parsons v. Dickinson*, 11 Pick. 352.

* *Parsons v. Dickinson*, *supra*, was an action of trespass for taking and carrying away a chaise and harness. It appeared that one Edwards, being in embarrassed circumstances and about to leave the State, about eleven o'clock on Saturday night called the plaintiff from his bed and sold him the chaise and harness; that the following afternoon or evening the plaintiff went to Edwards' house to get the property, but found it gone; that William Dickinson, one of the defendants, took it away Sunday afternoon, and that on Monday morning it was

sion merchant for sale, and he, after selling them, bought them on his own account, and afterward discovering that they were defective, the original owner was notified of the fact and agreed to take them back. The factor accordingly charged the original owner with them on his books, but the goods remained in the factor's possession. It was held that this was sufficient to revest the property in the original owner, the possession of the factor being the possession of his principal, and that the latter might maintain trespass against a wrong-doer for taking them.¹

§ 528. Where goods are assigned as security for advances of money, upon trust to permit the assignor to remain in possession of them until default in payment at the time stipulated, and upon further trust to sell them upon such default being made, the assignee has a sufficient possession to enable him to maintain trespass against a wrong-doer, such an assignment, though void as against creditors, being good as between the parties, and as between either party and a stranger. So likewise, one who holds personal property under a valid assignment for the benefit of certain creditors of the assignor, may maintain an action of trespass against a creditor not included in the assignment who takes the property away.

attached by Zebina Dickinson, a deputy sheriff, on a writ in favor of William Dickinson, who was a creditor of Edwards. On the foregoing facts, it was held that the plaintiff had sufficient possession of the property to entitle him to maintain the action. The court said: "If this should be considered as a question between a *bona fide* vendee and an attaching creditor, it would be clear for the latter, for the creditor attached the goods before the vendee had perfected his title by having an actual delivery of them to him. The case cited of *Lanfear v. Sumner*, 17 Mass. 110, would be conclusive upon the matter. The defendant, William Dickinson, claims in virtue of an attachment made for him by the other defendant, Zebina Dickinson, and they contend that the attachment was made on Monday after the sale to the plaintiff on Saturday, and before the vendee obtained the actual possession of the property. But the plaintiff contends that the defendants are not in a situation to avail themselves of the rule laid down in the case of *Lanfear v. Sumner*, because the creditor took the property on Sunday, after the sale, without any legal right, and removed and secreted it from the place where the vendee was to have received it. And the action is brought to recover damages for that trespass. The officer cannot be considered to be in a more favorable situation than the creditor in whose favor, and by whose direction, the attachment was made, immediately after the expiration of the Sunday. Now it is very clear, that the sale as between the vendor and vendee was good before the delivery."

¹ *Holly v. Huggerford*, 8 Pick. 73.

The owner of two horses agreed with certain of his creditors that a third person, who then had the custody of the horses, should keep them till a certain day in the following week, and then sell them at auction for the benefit of said creditors, the avails to be applied first to extinguish a certain demand and the balance to be paid to the other creditors according to the order of their attachments. The person who had charge of the horses was notified of the arrangement, and agreed to execute it on his part. He employed one of said creditors to keep the horses for him till the day of sale; but previous thereto, another creditor attached them and took them away. It was held that the contract under which said third person was appointed to sell the horses was in substance an assignment of the property for the satisfaction of particular debts; and being founded on a legal and sufficient consideration, and accompanied with actual possession, was entitled to protection against the interference of other creditors; and that, therefore, he might maintain trespass for such attachment.¹

2. In case of goods taken from officer.

§ 529. An officer after levying upon goods and chattels, has a sufficient property in them to enable him to maintain trespass against any person who takes them away;² but not if the process under which he claims to hold the goods is void;³ nor where he has consented to their removal;⁴ nor if, after seizing the goods, he has abandoned them, thereby losing his lien.⁵ But the officer's neglect to sell the property pursuant to his advertisement, will not defeat his right of action against a stranger for the disturbance of his possession;⁶ nor the fact that the execution has not been returned, the property being taken from the officer's possession before

¹ Mason v. Hidden, 6 Vt. 600.

² Lockwood v. Bull, 1 Cowen, 322; Casher v. Peterson, 1 South, 317.

³ Earl v. Camp, 16 Wend. 562.

⁴ Ibid.

⁵ Taintor v. Williams, 7 Conn. 271.

⁶ Earl v. Camp, *supra*.

the return day;¹ nor that the property attached has been assigned by the debtor to the creditor in discharge of the judgment, the officer's liability for the property still continuing;² nor that the creditor agreed with the officer who was about to attach the property, that he would protect him from all liability.³ * The defendant cannot be admitted to prove that the goods were mortgaged previous to the levy, or that they belonged to a third person, unless he connects himself with the outstanding title; nor can he be allowed to show that the goods were exempt, such an objection being proper only for the defendant in the process.⁴ But an officer cannot maintain an action founded on a right acquired after a return of the execution by which he has by order of the plaintiff formally released the levy. This being an official act, must be held to have subverted all the rights of the officer acquired by the levy thus explicitly and absolutely abandoned, as well as the rights of the plaintiff which grew out of the levy.⁵ †

¹ Sewell v. Harrington, 11 Vt. 141.

² Fletcher v. Cole, 26 Vt. 170.

³ Huntley v. Bacon, 15 Conn. 267.

⁴ Gibbs v. Chase, 10 Mass. 125.

⁵ Marsh v. White, 3 Barb. 518.

* In Huntley v. Bacon, *supra*, which was an action of trespass *de bonis asportatis*, brought by an officer for the taking away of property which he held under attachment, the defendants claimed that they had proved that the attaching creditors or some of them for whom the officer had attached the property in question had agreed to save him harmless for not removing the property attached; and they urged that the interest of the plaintiff in the cause of action was thereby extinguished. The court said: "The claim is a novel one. If sanctioned, it goes to the extent of holding that an officer can in no case recover for a trespass committed upon, or even for the destruction of property attached by him, if the circumstances of the case show that he is not liable to the attaching creditor. This doctrine cannot be supported by principle nor by authority. An officer is never liable, if he has followed the law and has been guilty of no culpable negligence; and it will not do to say that in all cases where the officer is justified by the law, a stranger—a wrong-doer—may invade his possession and take away or destroy the property thus in his legal custody. The gist of the action of trespass is the force and injury to the lawful possession of the plaintiff; and the wrongful act of a trespasser is not in any way modified, extenuated, or excused by reason of any agreement which such plaintiff, if an officer, may have made with attaching creditors."

† In all cases in which a deputy sheriff has legally done his duty, and the law visits on him a continued and ultimate liability, the same law must sustain him in an action necessary to his protection. Therefore, if a deputy sheriff attach property and take it into his possession, and it is unlawfully taken from him, he must have an action in his own name, as he is ultimately answerable (Stanton v. Hodges, 6 Vt. 64). But in New York it was held that he could not

§ 530. In such action it is enough for the officer to show, as against strangers, the seizure under the execution, without producing the judgment; possession of the goods thus acquired by the officer being sufficient to enable him to maintain trespass against a third party for taking them away without right.¹ But if the action is brought by the officer for the benefit of the plaintiff in an attachment, the judgment must be proved.² And the same must be done where the officer has a mere constructive possession created by the levy of an execution in an action for the benefit of the execution creditor.³

3. *Where goods are taken from a servant.*

§ 531. When chattels are taken from a servant, they are taken from the legal possession of his master, who alone can maintain trespass and recover damages against the taker.⁴

maintain an action in his own name against persons who wrongfully took property from him which he had seized by virtue of an execution (*Terwilliger v. Wheeler*, 35 Barb. 620).

Although the absolute owner of property, or an officer who has levied on it, and is therefore a special owner, may maintain an action of trespass for an unlawful intermeddling with such property by a stranger—and it is no defense in the latter case that there may be property enough remaining to satisfy the execution—yet it is otherwise when the suit is brought not for a direct injury to the property itself, but to recover the consequential damages sustained by a judgment and execution creditor, occasioned by the removal of property upon which he had acquired a lien by the levy of his execution. “For example, if a sheriff levy upon property to the value of \$300 to satisfy an execution of \$100, and a stranger should seize and convert a part of it worth \$50, it cannot be doubted that the officer might recover the value of the property thus wrongfully taken in trespass or trover. But if the plaintiff in the execution should sue an individual to whom the general owner (the defendant in the execution) had transferred a part of the property subsequent to the levy, for removing it he must prove that he necessarily suffered damage by the act complained of; that is, that there was not property enough left to satisfy his execution. Thus in the case of *Lane and Wife v. Hitchcock*, 14 Johns. 213, it was held that a mortgagee could not recover against one who had diminished the lien of his mortgage by removing a building from the premises bound by the mortgage, unless he could show that he suffered damages as a necessary consequence of the act. And he was required to show, not only that the removal of the building left the premises a scanty security, but that the mortgagor, who was personally bound, was insolvent. In the progress of this opinion, the court comment upon the case of *Yates v. Joyce*, 11 Johns. 140, and say that in that case the injury was shown to have been the occasion of inevitable damage to the plaintiff, and thus distinguish it from the one then under consideration” (*Gridley, J.*, in *Marsh v. White*, 3 Barb. 518).

¹ *Smith v. Burtis*, 6 Johns. 197.

² *Earl v. Camp*, 16 Wend. 562.

³ 15 Conn. 267.

⁴ *Brownell v. Manchester*, 1 Pick. 232.

Where the owner of goods requested a cartman to carry them to his own house to keep for him until the next day, it was held that, as the cartman had no interest or claim to hold the goods coupled with his possession, the rule of law applied that the general property drew after it the possession, and that the owner of the goods might therefore maintain an action of trespass against a third person for taking them away.¹*

4. *In the case of a corporation.*

§ 532. The possession of an officer of a corporation is the possession of the corporation, and when chattels belonging to the corporation are taken from him, the corporation is alone entitled to sue for and recover damages for the taking, unless the officer is authorized by statute to sue in his own name.²† So on the other hand, trespass will lie against a corporation for seizing goods and appropriating them.³

¹ Thorp v. Burling, 11 Johns. 285.

² Perkins v. Weston, 3 Cush. 549.

³ Maund v. Monmouthshire Canal Co. 2 Dowl. N. S. 113; 1 Car. & M. 606.

* Stanley v. Gaylord, 1 Cush. 536, was an action of trespass for taking and driving away a cow. The cow belonged to the plaintiff's intestate, and was in the possession of one Franklin, without any authority in him as against the intestate, to retain or dispose of her. The defendant took the cow, claiming her under a mortgage made to him by Franklin. No evidence seems to have been given of a delivery by Franklin, or any question made at the trial concerning it. The court said: "If Franklin was the bailee of the plaintiff's intestate, the taking by the defendant, without delivery, subjected him to an action of trespass by the intestate; and if Franklin was the mere servant of the intestate, the defendant became a trespasser by taking the cow, even though Franklin had delivered her to him. The question is whether the plaintiff could maintain trover in this instance, without first demanding a return of the cow. If he could, then he may maintain trespass; for whenever the taking of goods is wrongful, the taking is a conversion, and trespass, replevin, and trover without a demand, are concurrent remedies for the owner, if he has the right of immediate possession." Wilde, J., dissenting, said: "I am of opinion that the defendant is not liable in this form of action; nor would he be liable in an action of trover, for he has not been guilty of a conversion of the property. The conversion was by Franklin, against whom an action of trover might be well maintained; and if he is not able to respond in damages, the loss ought to be borne by the plaintiff, who confided the property to his custody, rather than by the defendant who has been guilty of no wrong. But no loss need be sustained by the plaintiff, for after a demand of the defendant and his refusal to restore the property, an action of replevin in the *detinet* would well lie."

For liability of master for wrongful acts of servant, see *ante*, §§ 42, *et seq.*

† Perkins v. Weston, *supra*, was an action of trespass for taking and carrying away school registers. At the trial in the Common Pleas, it appeared that the defendants claiming to be the school committee took the registers from the

5. *Where the goods belonged to a person deceased.*

§ 533. Where personal property which belonged to the testator at the time of his death is afterward tortiously taken or injured, as it vests on the death of the testator in his personal representative, the wrong is done to him, and he can sue in his own name without calling himself executor.¹* So

plaintiffs. The defendants insisted that the registers were the property of the town, and that plaintiffs had no such property in them as entitled them to maintain the action. The judge so held, and a verdict was found for the defendants. The Supreme Court said: "We are of opinion that the ruling was right. The school committee has no property general, or qualified, in the school registers, and no such possession thereof, distinct from the possession of the town, as is required by law in order to enable them to maintain this action and recover damages to their own use, but only the custody or charge of the registers as officers and servants of the town." The law in Massachusetts, when the foregoing action was brought, was as follows: By the St. of 1838, ch. 105, the board of education were directed to prescribe a blank form of a register to be kept in schools, and the secretary of the State was directed to forward copies of the same to the school committees who were directed to cause registers to be faithfully kept, according to the form prescribed. By St. 1845, ch. 100, the secretary of the State was directed to cause blank school returns and registers to be forwarded to the sheriffs of the several counties, who were directed to forward them to the town clerks of the several towns; and by St. 1845, ch. 157, the said secretary was directed to transmit register books sufficient to last for five years or more, instead of the single sheets for registers which were previously transmitted; and it was also enacted that no school teacher should be entitled to receive payment for his services, until the register for his school, properly filled up and completed, should be deposited with the school committee, or with some other person designated by them to receive it.

¹ Patchen v. Wilson, 4 Hill, 57.

* But this is not the case where the executor sues on a contract made with the testator. There he must necessarily sue in his representative character; and this is so, although the time for payment or performance had not arrived when the testator died. In the case of a chattel, the representative may sue in his own name, and then use the letters testamentary as a part of his claim of title. But except upon a note payable to bearer, the representative cannot sue on a contract made with his testator without calling himself executor.

In Keniston v. Little, 10 Fost. 318, the defendant, a deputy sheriff, seized the cattle of the plaintiff upon an execution against him, and sold them and applied the proceeds in discharge of the execution. The question was, whether the officer could justify the taking. It was contended by the plaintiff that, as the judgment recited in the execution was "against Benjamin C. Keniston, of, &c., administrator of the estate of James M. Knowlton, late of, &c., deceased," it was a judgment against the plaintiff in his capacity of administrator, and the precept to cause the sum recovered "to be levied of the goods, chattels, or lands of said debtor," was limited to the goods, chattels, or lands of the debtor as administrator of Knowlton. If this view was correct, it was clear that the officer could not justify a levy upon the private estate of the administrator, because his precept gave him no authority to levy upon anything except the estate of the intestate. It was held that the execution was to be regarded as running against the plaintiff in his individual character, and his own goods and estate were liable to be levied upon under it. The court said: "It is contended that an execution for costs against an administrator, should run not against the goods of the administrator himself, but against the goods of the deceased in his hands

likewise, an administrator may maintain an action of trespass for a wrongful seizure of the intestate's goods made between the death of the intestate and the grant of letters of administration; and a demand is not necessary prior to the commencement of the action.¹ In England, previous to the statute of 4 Edw. III, no action *ex delicto* would survive to the personal representative. That statute authorized an executor to maintain an action of trespass for chattels taken and carried away in the life-time of his testator; and the principle by an equitable and somewhat liberal construction of the statute extended to all cases of injury to personal property. So on the other hand, whenever the property taken by the testator or intestate was converted to his own use, so as to become a part of his assets, an action in some form would lie against his personal representative.² * Where

to be administered. If this is a proposition universally true, and without any exception, it might furnish ground for an argument that the execution must have been issued in this case, either erroneously or irregularly. If there is any case in which an execution may properly issue against the proper goods of an administrator, then the execution here is well enough so far as the officer is concerned. He is not bound to look beyond the face of the execution, and if there is nothing there which shows it to have issued improperly, he is not bound to inquire further. Where the cause of action is alleged to have arisen after the death of the testator or intestate, and the executor or administrator might sue in his own right, without describing himself as such, judgment may well be entered against him *de bonis propriis*; the allegation that he was executor or administrator being considered in such case as a *descriptio personæ*, so that upon the face of the execution there was nothing that indicated any error or irregularity. If the process here did issue either erroneously or irregularly, the court having jurisdiction, it is not void, but is at most voidable. If erroneous, a party even may justify under it whatever was done by virtue of it while it was in force; and if irregular, it is a justification for the party until set aside. Much more must it be so, in the case of an officer" (citing *Blanchard v. Goss*, 2 N. Hamp. 491; *Pilsbury v. Hubbard*, 10 Ib. 224).

¹ *Hutchins v. Adams*, 3 Maine, 161; 1 Chitty's Pl. 166; *Tharpe v. Stallwood*, 5 Man. & G. 760.

² *Hambly v. Trott*, Cowp. 371; *Mellen v. Baldwin*, 4 Mass. 480; *Cravath v. Plympton*, 13 Ib. 454; *Holmes v. Moore*, 5 Pick. 257; *Towle v. Lovet*, 6 Mass. 394.

* By 25 Edw. 3, c. 5, the benefit of the statute is extended to executors of executors.

The New York statute (Rev. Sts. 5th ed. p. 202, § 4), provides that executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his life-time. They may also maintain actions for trespass committed on the real estate of the deceased in his life-time. This New York statute was borrowed from 4 Edw. 3d, ch. 7, which had made a similar provision, by the equity and liberal construction of which it

an administrator refuses or neglects, upon request made, to allow property to be appraised and set apart for the widow, she cannot maintain trespass against him, the widow having neither a general or special property in any particular goods until after the election and appraisement.¹ Although the goods of a testator in the hands of an executor cannot be seized under an execution against the executor to satisfy a judgment debt due from the executor in his own right; yet if the executor has committed a devastavit, and the goods have been converted to his own use, the executor cannot justify his own misconduct by saying that the goods do not belong to him, but to his testator.²

6. *Where property is mortgaged.*

§ 534. By the general rules of law, a mortgage of goods is a transfer defeasible, indeed, on a condition subsequent, still a transfer which vests the general property in the mortgagee. When there is no express stipulation to the contrary, the right of possession follows the right of property, and the mortgagee may maintain an action of trespass against one who wrongfully takes it away, without giving notice to the

was extended to almost every injury done to the personal estate of the testator before his death.

The New York statute further provides that "any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate who in his life-time shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person. The executors and administrators of every person who as executor either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use any goods, chattels or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living" (Rev. Sts. of N. Y. 5th ed. p. 202, §§ 5 and 6). "For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators against such wrong-doer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects as actions founded upon contracts. But the preceding section shall not extend to actions for slander, for libel, or to actions for assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate of any executor or administrator" (Ibid. p. 746, §§ 1, 2).

¹ Neely v. McCormick, 25 Penn. St. R. 255.

² Farr v. Newman, 4 T. R. 621; Gaskell v. Marshall, 1 M. & Rob. 132; Fenwick v. Laycock, 2 Q. B. 110; Quick v. Staines, 1 B. & P. 293.

mortgagor or person in possession of his intention to foreclose the mortgage;¹ and such action may be brought, even though the debt for which the mortgage was given has not become due.² In Kentucky, the equity of redemption in a slave having been sold under execution, and the slave delivered by the sheriff to the purchaser, the agent of the mortgagee seized the slave. In an action of trespass therefor by the purchaser against the agent, it was held that, in the absence of proof of a right of possession by agreement in the mortgagor, the plaintiff was not entitled to recover.³ In a case in New York, a mortgage of personal property provided that the mortgagee might take possession and sell whenever he deemed himself insecure. It was held that the mortgagor was a mere tenant at sufferance, and that a sheriff who seized the property, by virtue of an execution, with notice of the mortgage, and after demand of the property by the mortgagee, rendered himself liable to damages in an action against him by the mortgagee.⁴

§ 535. Although the mortgage be payable on demand, yet, as between the mortgagee and a wrong-doer, no demand is necessary, unless required by the statute.⁵ * And if it be

¹ Brackett v. Bullard, 12 Metc. 308.

² Woodruff v. Halsey, 8 Pick. 333; Foster v. Perkins, 42 Maine, 168.

³ Swigert v. Thomas, 7 Dana, 220.

⁴ Farrell v. Hildreth, 38 Barb. 178.

⁵ Brown v. Cook, 3 E. D. Smith, 123; Cassedy v. Hunt, N. Y. Common Pleas, June 8th, 1844; Delano v. Thurnell, Ib. Feb. 1842.

* Where goods which were mortgaged were seized under an attachment against the mortgagor, and the demand and notice required by the statute were given by the mortgagee, and the attachment was afterwards dissolved by proceedings in insolvency against the mortgagor, but the officer proceeded notwithstanding to sell, it was held, in an action of trespass by the mortgagee against the officer, that the plaintiff was entitled to damages to the value of the property at the time of the taking, whether it had been claimed by the assignee in insolvency or not (Codman v. Freeman, 3 Cush. 306). Shaw, C. J.: "The case stands thus: By force of the mortgage, the plaintiffs became owners of the property as against the mortgagor, with a right of present possession, by a defeasible title, indeed, still by a title which made them owners until defeated. The sheriff takes them under claim of a right to attach them in behalf of creditors; but that attachment is dissolved, and then the plaintiffs have the same right against the officer as they would have against any other stranger; and upon recovering damages, they are entitled to the full value. We are strongly inclined to think that, independently of this dissolution of the attachment by insolvency, the result would have been the same; because, from and after the plaintiffs' notice of their mortgage and demand on the officer—neither the officers nor the attaching cred-

agreed between the mortgagor and mortgagee that, upon default made in payment, the goods shall, on demand, be delivered to the latter, an action of trespass may be maintained by the mortgagee against a person who, after the expiration of the time of payment, removes the goods, without a previous demand on him for them. In an action of trespass for taking goods, the plaintiff claimed title to them under a mortgage from one Clark, dated in February, made to secure a note payable one year from the first of the following April. The defendant claimed the goods under a bill of sale of them, given to him subsequent to the execution of the mortgage, for a debt which Clark owed him, "to have and to hold the same to him, and their use and benefit forever; said property to remain in my (Clark's) possession until called for by said Knox, and then to be delivered up to him free of expense." It was proved that, on the 13th of March, about a week after the delivery of the foregoing bill of sale, the plaintiff and Clark agreed, by an indorsement made on the mortgage and note, that the note should be paid on the first day of the next May, and in case the note was not then paid, that Clark would deliver the goods to the plaintiff on that day, or at any subsequent period when the plaintiff should see fit to demand the same. It was further proved that, shortly after the expiration of the time last above mentioned, the defendant took said goods and conveyed them in the night into the State of Connecticut, in order to secrete the same from the plaintiff and defeat his lien. All of the papers, excepting the note, were duly recorded in the office of the clerk of the town where Clark resided. It was held that the action would lie without proving a demand on the defendant for the property.¹*

itors having made any tender—the holding was wrongful, and the plaintiffs became entitled to the full value, as a substitute for the goods which, by relation, were thus unlawfully taken from them. But, as the fact of the dissolution of the attachment makes the case clear of difficulty, we have preferred putting our decision on that ground" (citing *Pomeroy v. Smith*, 17 Pick. 85).

¹ *Boise v. Knox*, 10 Metc. 40.

* In *Boise v. Knox*, *supra*, the court said: "The mortgage was an actual, though conditional, transfer and conveyance of the cattle and goods, by which

§ 536. If it be agreed between the mortgagor and mortgagee that the former shall retain possession of the goods, but in case they are attached by another creditor, that then the mortgagee shall have the right to immediate possession, an officer who removes them, under an attachment against the mortgagor, will be liable as a trespasser. In *Welch v. Whittemore*,¹ the plaintiff, in support of the action, relied upon a mortgage of the goods in question from Wm. F. Welch to him, to secure the payment of a promissory note, which had not arrived at maturity at the time of the alleged taking by the defendant. The mortgage provided that, until default of the mortgagor to pay the note according to its tenor, he might retain possession of the property and use and enjoy the same; "but if the same or any part thereof shall be attached at any time before payment, &c., by any other creditor or creditors of the said Wm. F. Welch, then it shall be lawful for the said John Welch, his executors, &c., to take immediate possession of the whole of said granted property to his and their own use." The defendant justified the taking as a deputy sheriff under an attachment in favor of a creditor of Wm. F. Welch against him. A verdict having been found for the plaintiff in the court below, it was sustained by the Supreme Court.*

the property vested immediately in the mortgagee, defeasible on a condition subsequent; and there being no stipulation that the possession should remain with the mortgagor, the right of possession followed as incident to the right of property, and the possession of the mortgagor was that of the mortgagee. And it made no difference, as to the property and the possession and the legal rights of the mortgagee therein, whether the debt for which they were hypothecated was due or not. The defendant took nothing by his subsequent bill of sale from Clark but a right of redemption. The agreement between Clark and the plaintiff to accelerate the payment of the note could not be injurious to the defendant, because it did not affect the right of possession that was in the plaintiff before, nor the right of redemption, which, as against the defendant, he could not foreclose until after the time originally fixed by the mortgage" (and see *Woodruff v. Halsey*, 8 Pick. 333; *Thurston v. Blanchard*, 22 Ib. 20).

An action of trespass *de bonis asportatis* for timber cut from mortgaged premises, may be brought by the executor of the mortgagee of the premises (*Brooks v. Goss*, 61 Maine, 307).

¹ 25 Maine, 86. And see *Paul v. Hayford*, 22 Ib. 234; Rev. Sts. of Maine, ch. 117, § 38, and amendment to same of 1842, ch. 31, § 12.

* In the above case, the Supreme Court, in overruling exceptions to the verdict, said: "The mortgage being *bona fide*, the evident object of the parties

§ 537. If the mortgagee be in possession of the goods, he may maintain an action of trespass against a person who

thereto was to give to the plaintiff security for his debt, without depriving the debtor of the use of the property; but the ordinary right of a mortgagee to take possession of the property at pleasure, was not intended to be abridged by the interference of any other creditor. As it was the privilege of the parties to stipulate that the plaintiff should have entire control, till the redemption of the goods, they could make such restrictions as they pleased. If the mortgage was silent on the subject of possession, the defendants would, on every principle, be liable to an action of trespass. Can they be less so, when it was specially provided that such an attachment at the time it should be made should give the right to the plaintiff to take immediate possession? The attachment and this right were to be simultaneous. The law will not say that the attachment is legal, when it can give no right to the officer who makes it to hold possession of the property, and can create no lien for the security of the debt of the creditor. By the construction to be put upon the instrument, the taking by the defendant was an injury to the possession of the plaintiff secured to him therein."

Where the mortgagee of personal property has left it in the custody of the mortgagor, he may lawfully take possession of it, notwithstanding the mortgagor may have transferred it, subsequent to the mortgage, to a creditor to secure a debt, and the creditor and mortgagor have joint possession of it. *Coty v. Barnes* (20 Vt. 78) was trespass for taking a cow. One Landue had been the owner of the cow, and had mortgaged her to the defendant as security for rent. The cow still remained in the possession of Landue; and he afterward sold her to the plaintiff, as security for a debt he owed him. The plaintiff had the cow for four or five days, and she then went back into the custody of Landue and the plaintiff, and remained in that situation until the defendant took possession of her, under his mortgage. Judgment having been rendered for the defendant in the county court, the Supreme Court, in affirming it, said: "Both the defendant's and the plaintiff's title to the cow was incomplete against the creditors of Landue and subsequent *bona fide* purchasers from him. There was no sufficient change in the possession of the cow. The fact that the plaintiff had the exclusive possession only four or five days can be of no avail. But the title of each is good against Landue—no change in the possession being necessary as to him; and it has been frequently decided in this State that, if two officers attach the same property, each leaving it in the possession of the debtor, either of them may, at any time, complete his title by taking possession, not only against third persons, but also against the other officer. The reason is, that the use or trust, in which the fraud consisted, is determined when the possession is taken; and it being simply what is termed a fraud in law, the title is purged of such objection when a substantial and visible change in the possession is effected. The axiom, 'He who is first in time, is first in right,' well applies in such case. The defendant has not only the elder title as against Landue, but he is first in time in taking an exclusive possession, not only against Landue, but also against the plaintiff, who claims under a junior title from Landue. If we then apply the same principle to purchasers that has been applied between attaching creditors, the defendant might well take the possession, so long as the plaintiff's title was incomplete. But it is said, the plaintiff had, in fact, the possession of the cow when the defendant drove her away, and consequently, the superior right; but it was a joint possession with Landue, and the plaintiff's title was then incomplete, except as against Landue. The creditors of Landue might have well attached the property, and thereby have acquired a right paramount to the plaintiff. The plaintiff should not stand in any better situation, as against this defendant, than he would against attaching creditors. Both the plaintiff's and the defendant's title was incomplete until the defendant took the possession of the cow. He then purged the transaction of the fraud in law in relation to his own title, leaving it in full operation as to the plaintiff's title. It is difficult to see how it can be claimed that, as between these parties,

seizes them, although the mortgage be afterwards adjudged void. *Perry v. Chandler*¹ was an action of trespass against a sheriff for taking and carrying away dry goods. The goods belonged to one Maynard, who mortgaged them to the plaintiff to secure a debt, the plaintiff taking them into his possession. The defendant seized them by virtue of an attachment in favor of the creditors of Maynard, who was afterwards adjudged a bankrupt, and the attaching officer appointed his assignee. The goods were finally sold by the assignee, the avails distributed among the creditors of Maynard, and the mortgage declared by the District Court null and void, and ordered to be delivered up to be canceled. It was held that the action might be maintained, it having been instituted against the defendant at a time when the plaintiff had a right to the property, subject only to the contingency that at a future day his title might be defeated by proceedings against his mortgagor in bankruptcy.

§ 538. A second mortgagee in possession of personal property, the first mortgage remaining unsatisfied, may recover in trespass against a stranger, for the wrongful taking of the property, its value with interest from the time of the taking.² * And a person who has paid money due upon a mortgage may, for the purpose of effecting substantial justice, be substituted in the place of the incumbrancer, and

the plaintiff has the superior title. If the defendant were a stranger to all title, the plaintiff might well stand upon his concurrent possession with Landue. We think, while the plaintiff's title continued incomplete against creditors, for want of a sufficient change in the possession, the defendant had the same right to complete his title that he would have had if the sole possession had remained in Landue."

¹ 2 Cush. 237.

² *White v. Webb*, 15 Conn. 302.

* An officer in order to justify the taking of goods from the possession of a bailee of the mortgagee, under a writ against the mortgagor, must first pay or tender the amount due upon the mortgage (*Barker v. Chase*, 24 Maine, 230).

Where goods in the hands of the mortgagee are seized and sold under execution as the property of the mortgagor, an action of trespass may be maintained by the mortgagee against both the sheriff and the plaintiff in the execution (*Sanders v. Vance*, 7 Monr. 209).

treated as the assignee of the mortgage, although the mortgage itself has been discharged.¹ *

¹ Heath v. West, 6 Fost. 191; Robinson v. Leavitt, 7 N. Hamp. 99.

* Heath v. West, *supra*, was an action of trespass for taking and carrying away the plaintiff's horse. Heath, the plaintiff, bought the horse of one Dennison, and executed a mortgage to him to secure a part of the purchase money. Dennison, failing to get his pay, called on Heath either to pay the money or give up the horse. There was talk between Heath and one Hall as to Hall's paying for and owning one-half of the horse; and it was agreed that Hall should sign a note for \$75, to raise money to pay Dennison, and should keep the horse until spring, and then pay for and own half of him, if he elected to do so. Before this, Dennison had seen the defendant West, and told Heath and Hall that West would advance the money on their note and a mortgage of the horse. Dennison offered to assign his mortgage to West, but West said he did not want an assignment, but a new mortgage. Heath and Hall made their note and mortgage to West, and Dennison destroyed the note he held and canceled his mortgage, and delivered it to West. The horse was taken and sold by the defendant on the mortgage. At the date of the above mentioned transactions, as well as at the time of the taking, the plaintiff was under age. Had the controversy arisen between Heath and Dennison, the case would have been clear. If Dennison had in terms assigned his mortgage to West, the case would have been equally clear between Heath and West. The transaction not being in form an assignment of the mortgage, the question was, whether consistently with recognized legal principles, it could be regarded as so far in substance an assignment as to give West the benefit of it. The court said: "It seems apparent that the debt to Dennison was substantially paid by West, and that substantial justice will be promoted by regarding West as substituted in Dennison's place, and treating him as assignee of Dennison's mortgage. The object of all parties was to give to West a valid security upon this horse for the money he advanced to pay Dennison, and it is just to all parties to regard the Dennison mortgage as not discharged, but still subsisting for the benefit of West. It was clearly the interest of West to take an assignment of Dennison's mortgage, because that could not be avoided without also avoiding Dennison's sale. It was a case where the parties acted under a mistake, the obvious effect of what they did being to destroy a good and effectual security, and to give a writing in its stead which was without any binding effect. We are of opinion that West should be regarded as the assignee of Dennison's interest in this animal, and entitled to take and sell the creature by virtue of the mortgage, and if that is considered as avoided, then the sale to Heath being at the same time avoided, West had a right to take and dispose of the animal under Dennison's original title."

Taggart v. Packard, 39 Vt. 628, was an action of trespass for a quantity of hay. It appeared that the defendant and one Russell contracted with one Raymond for the use of certain premises owned by Raymond, by which it was agreed that Russell should cut the hay and put it in the barn on the place; but that if Russell should pay Raymond on or before the 1st of October then next the sum of \$12, then the hay was to belong to Russell. The \$12 were not paid by the 1st of October, but on the 14th of October Russell paid \$6 on account. On the 14th of November, the balance not having been paid, Raymond sold the hay to one Adams for \$6, and assigned the contract to him. Adams had meanwhile bought of Russell his half of the hay as between him and the defendant, with full knowledge of the arrangement between Raymond, Russell, and the defendant. Subsequently, Adams sold his interest in the hay to the plaintiff and assigned to him the aforesaid contract. Afterward the defendant tendered to the plaintiff the balance due, and claimed half of the hay, which the plaintiff refusing, the defendant took half of the hay away, and it was for that act that this suit was brought. It was held that the effect of the several transfers was to put the plaintiff in the place of Raymond, and to vest in him the same right to

§ 539. At common law, a mortgage or sale of future acquired chattels, the mortgagor neither having the goods nor the agent of their production at the time of making the contract, creates no valid subsisting title. It was accordingly held that a clause in a mortgage of goods in a store conveying not only those then in the store, but whatever might be therein at any time in the course of the mortgagor's business, was, as to subsequently acquired goods, inoperative for the purpose of enabling the mortgagee to maintain an action at law against the party seizing them.¹ * But if the future acquired chattels are necessary for the preservation and utility of the thing mortgaged—or are the product of present property in the mortgagor, as the wool growing on sheep, or the produce of a dairy or farm, or anything of that character—the mortgage will take effect upon the property as soon as it comes into existence, and be binding at law.² Where after the mortgage of a vessel, the mortgagor substitutes new sails for the old ones, which are nearly worn out, and the

the hay that Raymond would have had if he had retained his interest in it; that the transaction could only be regarded as a pledge of the hay to Raymond as security of the rent of \$12, to be redeemed by the payment of that sum on or before the first day of October then next; that the rent not having been paid by the first of October, Raymond had the right to compel the defendant to redeem the pledge or be foreclosed of all his rights therein, but that until he did so, the defendant had the right to redeem; and that as the defendant tendered to the plaintiff the balance due before he took the hay, and took it peaceably, he was not a trespasser.

¹ Hamilton v. Rogers, 8 Md. 301; Lunn v. Thornton, 1 Man. Gr. & Scott, 379; but see Tapfield v. Hillman, 6 Man. & Gr. 245; Hannon's Exrs. v. The State use of Robey, 9 Gill, 440; Hudson v. Warner, 2 Har. & Gill, 428; Preston v. Leighton, 6 Md. 98.

² Van Hoozer v. Cory, 34 Barb. 9; Otis v. Sill, 8 Ib. 102; Holroyd v. Marshall, 9 Jur. N. S. 213.

* Rowley v. Rice, 11 Metc. 337, was an action of trespass against a sheriff for entering the plaintiff's store and attaching his goods upon a writ sued out against one Tingley. The plaintiff claimed the goods by virtue of a prior mortgage of them by Tingley to him, given to secure the payment of certain notes; and the mortgage purported to include not only the goods then in Tingley's store, but such as he might afterward purchase. It appeared that by an arrangement made between the plaintiff and Tingley, the plaintiff took possession of all the goods, as well those after purchased as those existing at the time of the mortgage, under an agreement that he should sell the same, pay his own notes out of the proceeds, and account to Tingley for the surplus. It was held that the officer was justified in taking and holding the goods, because the attaching creditor must pay the amount for which they were hypothecated, unless the officer kept possession of the store an unreasonable length of time, in which case he might become a trespasser *ab initio*.

mortgagee then takes possession of the vessel and sells it at auction under the mortgage, he becoming the purchaser, the new sails will belong to him as part of the vessel.¹* When during the term of a mortgage upon a printing establishment, the type and other materials belonging to it are removed and new ones substituted, if the new type and materials were procured for the purpose of replenishing the establishment mortgaged, and of supplying the place of articles belonging to it which had been lost or destroyed by use, and were attached to and incorporated with it, they become a part of the establishment, and by right of accession belong to the owners of it. They form an incident to, and follow the title of the printing establishment to which they are attached, which is the principal thing. So, if the borrower of a watch replace its crystal, or of a musical instrument one of its strings, keys, or pipes which has been lost, destroyed, or become useless in his service, it belongs to the lender.²

§ 540. Where the mortgagee causes the property to be sold under a judgment and execution for the mortgage debt, he thereby waives all claim under the mortgage. A. mortgaged certain goods to B. to indemnify him for signing a note to S. as A.'s surety, and B. assigned the mortgage to S. A. then mortgaged the same goods to C. S. brought an action

¹ Southworth v. Isham, 3 Sandf. 448.

² Holly v. Brown, 14 Conn. 266.

* In Southworth v. Isham, *supra*, the court remarked that if it were even conceded that the mortgagor could have removed the new sails before actual possession by the mortgagee under the mortgage, still after such possession the mortgagor's claim was gone. Conderman v. Smith, 41 Barb. 404, was an action by the lessor and purchaser against a creditor of the lessee who had taken and sold the products of the farm and dairy upon execution. It was held that it did not fall within the rule which prohibits the selling or mortgaging property not in existence or not owned at the time by the vendor or mortgagor. It was the product of property which the vendor owned at the time, and was potentially his, and therefore the subject of sale. This is an old and well settled doctrine, and is fully examined in Van Hoozer v. Cory, *supra*. The case is distinguishable from that of a sale or mortgage of property to which the seller or mortgagor has no right at the time of the sale or the mortgage, either actual or potential, but in which he expects he shall acquire some title or right at a future day.

A verbal sale of all the personal property the vendor then had, and all that he might thereafter acquire and die possessed of, will not pass the legal title to the subsequently acquired property, so as to enable the vendee to maintain trespass for its removal (Wilson v. Wilson, 37 Md. 1).

against A. and B. on their said note, and attached the goods, and, having obtained judgment, caused the goods to be sold under an execution. It was held, that S., by causing the goods to be sold by virtue of the execution, must be deemed to have waived all claims under the mortgage; that C. might maintain trespass against S. and the officer who sold the goods, and that the measure of damages was the value of C.'s right to redeem the goods.¹ * If the mortgagee, the condi-

¹ Kimball v. Marshall, 8 N. Hamp. 291.

* In this case, the court said that it would be grossly unjust to let S. set up the mortgage after he had voluntarily caused the goods to be sold, and put it out of his power to restore them upon performance of the condition of the mortgage by C., and that the wrong to C. was the same that it would have been had S. taken the goods without an execution and sold them, giving the plaintiff no opportunity to redeem. "The plaintiff," continued the court, "has never had possession of the goods, and can be held to account with the mortgagor only for the amount he may recover in this case. The only loss he has sustained through the injurious acts of the defendants is the loss of the privilege of redeeming the goods. And we are of the opinion, that the value of that privilege is the measure of the damages to which the plaintiff is entitled."

In an action of trespass *de bonis asportatis* against a deputy sheriff, it appeared that the goods in question were held by the plaintiff under a mortgage from one Case, the former owner, and that the defendant attached them as the goods of Case. The goods were mortgaged by Case to the plaintiff, to secure him as accommodation indorser of a note which afterward became the property of a bank. After the seizure of the goods by the defendant, the plaintiff caused a suit to be brought on the note in the name of the bank against Case by writ of attachment, which the plaintiff put into the hands of the defendant, directing him to attach the same goods subject to the former attachment. It was held, that the trespass of the defendant in taking the goods out of the possession of the plaintiff, was not waived by reason of the plaintiff's acts in relation to the subsequent attachment in favor of the bank; but that the conduct of the plaintiff, in relation to that suit, was a proper subject for the jury to consider in determining the validity of his mortgage title (*Dyer v. Cady*, 20 Conn. 563).

Frothingham v. McKusick, 24 Maine, 403, was an action of trover by the assignees of the mortgage of certain land for a quantity of logs and boards, with counts in trespass *de bonis asportatis* for the same. The defendant admitted that he sawed and manufactured into boards six hundred and fifty thousand feet of the timber. He attempted to excuse himself upon the ground that he acted as the hired servant of those who cut it. But it appeared that he furnished supplies and aided, by paying the workmen under his employer, in cutting and hauling the timber, until his claim therefor, and for sawing, amounted to \$3,000, for which he was reimbursed nearly to the whole amount from the proceeds of the timber, a number of thousand feet of which he sold himself. The defense was, that the person under whom the defendant acted was licensed, by the mortgagor to cut the timber and to manufacture it into boards upon certain terms and conditions. But the license was granted long after the conveyance in mortgage to the plaintiffs. It appeared that the plaintiffs took an assignment of the rights of the mortgagor arising under the license. This, however, was not done until the timber in question had been cut, hauled, and nearly all manufactured and disposed of by the defendant and the person under whom he pretended to act. The defendant contended that the taking of the assignment of the license

tion being broken, sell otherwise than in the manner directed by the statute, he will not, by so doing, become a trespasser *ab initio*, the title of the mortgagee not being forfeited by such sale, as that of a mere bailee might have been.¹

§ 541. Where the parties have stipulated in the mortgage that the mortgagor shall keep possession until condition broken, or for a certain time, or until the occurrence of some future contingency, the right of the mortgagee will be thereby suspended until the right of possession of the mortgagor has ceased.² A mortgagor of chattels remaining in possession before default, under a clause entitling him to such possession, has an interest in the property which is subject to levy and sale on execution against him. Although the interest which passes to the purchaser at such sale is only such an interest as the mortgagor had, yet the sheriff, and the parties promoting the sale, are not trespassers if the sale is in general terms, without any notice being taken of the existence of the mortgage. These points were involved in *Hull v. Carnley*,³ which was argued in the New York Court of Appeals, and settled, after mature deliberation.* But after default in the

was a ratification of the authority of the mortgagor to grant the permit, and a waiver of the rights of the plaintiffs under the mortgage. The court held, that as the right of action against the defendant as a *tort-feasor* had long before become fixed in the plaintiffs, and could not be removed but by a release, or accord and satisfaction, they were entitled to recover.

¹ *Leach v. Kimball*, 34 N. Hamp. 568.

² 4 Kent. Com. 138; *Story on Bailm.* 287; *Hoyt v. Remick*, 11 N. Hamp. 285; *Smith v. Moore*, Ib. 55; *Ash v. Savage*, 5 Ib. 545; *Libby v. Cushman*, 16 Shepl. 429; *Brackett v. Bullard*, 12 Metc. 308; *Russell v. Butterfield*, 21 Wend. 300; *Welch v. Whittemore*, 12 Shepl. 86; *Redman v. Hendricks*, 1 Sandf. 32; *Skiff v. Solace*, 8 Wash. 279; *Leach v. Kimball*, *Supra*.

³ 17 N. Y. 202; s. c. 11 Ib. 501; 2 Duer, 99. And see *Marsh v. Lawrence*, 4 Cowen, 461; *Otis v. Wood*, 3 Wend. 498; *Bailey v. Burton*, 8 Ib. 339; *Mattison v. Baucus*, 1 Comst. 295; *Livor v. Orser*, 5 Duer, 501; *Goulet v. Asseler*, 22 N. Y. 225; *Manning v. Monaghan*, 28 Ib. 585.

* It has been held, in Vermont, that when machinery in a factory is mortgaged, either with or without the land, and left in the possession of the mortgagor, it may be attached as his property. *Sturgis v. Warren*, 11 Vt. 433, was an action of trespass against a deputy sheriff for attaching and taking away wool, cloth, machinery, a factory bell, &c. It appeared that a certain manufacturing company mortgaged to W. and B. their factory and the machinery therein on the 6th day of Jan., 1837. The company, still remaining in possession of the property mortgaged, the defendant attached it as their property on the 22d day of the following April. On the 15th of May next thereafter, W. and B. assigned

mortgage and possession by the mortgagee for the purpose of foreclosure, and knowledge thereof by the parties, if they take and sell the entire property, and not merely the interest of the mortgagor, they become trespassers.¹

§ 542. One's right in his property is not divested or changed as against strangers, by reason of his having mortgaged it for another's debt. As against all persons but the mortgagee and those claiming under him, the mortgagor has the right of property and of possession, and can maintain trespass for its removal.² *Cram v. Bailey*³ was an action against an officer for wrongfully attaching the goods of the plaintiff. It appeared that the property was mortgaged by

their mortgage to the plaintiff, but the assignment was not witnessed, acknowledged and recorded, until the 23d day of January, 1838. In July, 1837, the plaintiff took possession of the factory. Afterward judgments were obtained on the attachments, and in January the defendant sold the machinery in question, on the executions. The machinery and bell were secured to the building in the usual manner. Judgment having been rendered for the defendant by the County Court, the Supreme Court said: "Some doubt has perhaps been expressed when personal property is mortgaged with real estate, and the statute gives the use of the real estate to the mortgagor until the pay day, and the use of the personal property with the realty constituted its main value, whether such case ought not to constitute an exception to the general rule that the possession of personal property must always accompany and follow the sale or mortgage, to protect it from attachment. We find it, however, extremely difficult to adopt any such exception, from the impossibility of ascribing to it any distinct limitations. It might be made to cover a store with its goods, or a farm with its stock, as well as a factory with its machinery."

By indenture of sale, A. assigned all of his household goods, &c., to secure a debt due from him to the assignees, subject to a proviso that the deed should become void upon payment of the said sum on a certain day, or on some earlier day, to be appointed by the assignees by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed, interest to be paid in the mean time. It was also agreed by the deed, that after default made in payment contrary to the said proviso, it should be lawful for the assignees to enter and take possession of the goods, and to sell them and reimburse themselves out of the proceeds, accounting to A. for any surplus; and that until such default, it should be lawful for A. to hold, use, and possess the said goods without hindrance from the assignees. The assignees served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took and sold the goods assigned; but the notice was bad, having been served less than twenty-four hours before the day of payment appointed by the assignees. It was held, that A. had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice; and that he might, therefore, sue the assignees in trespass for having wrongfully entered and sold (*Brierly v. Kendall*, 17 Adol. & El. N. S. 937).

¹ *Gelhaar v. Ross*, 1 Hilton, 117.

² *Hanmer v. Wilsey*, 17 Wend. 91; *Carnrick v. Myers*, 14 Barb. 9.

³ 10 Gray, 87. And see *Ullman v. Barnard*, 7 Ib. 558.

the plaintiff and her daughter to one Chase, to secure the indebtedness of the daughter to him, and that Chase, when he received the mortgage, and the defendant, when he attached the property, knew that it belonged to the plaintiff. At the trial in the Common Pleas, the defendant offered to prove that Chase had released the defendant and the attaching creditors from all claim for damages. But the evidence was rejected. The defendant contended that the plaintiff, by uniting with her daughter in mortgaging her property, rendered it liable to attachment as the daughter's, and that the plaintiff could at all events only recover the value of the right of redeeming the property from the mortgage. The jury having, under the instructions of the judge, found a verdict for the plaintiff for the full value of the property, the Supreme Court refused to disturb it.*

§ 543. Where property is sold, and a mortgage given back to secure the purchase money, it is, in law, one transaction; and one part cannot be disaffirmed or rescinded without the other being disaffirmed or rescinded also. A person cannot apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other which it may not be for his interest to fulfil. Thus, it has been held, that an infant cannot avoid a mortgage and affirm a deed when both are made at one and the same time, relate to the same property, and go to make up one transaction. If the mortgage be avoided under the plea of infancy, the deed becomes of no effect. Where, therefore, an infant, having bought a horse, gave back a mortgage for the balance of the purchase money, it was held, that he could not repudiate

* In *Cram v. Bailey supra*, the court said: "The plaintiff's right in her property was not divested or changed as against strangers, by reason of her having mortgaged it for her daughter's debt. As against all persons but the mortgagee and those claiming under him, she had the right of property and of possession, and can maintain this action. The measure of damages to the plaintiff was the value of the property at the time it was taken. The fact that a third person had a claim upon it did not diminish the plaintiff's claim for damages. The settlement made by the attaching creditors with the mortgagee, without the plaintiff's knowledge or consent, did not affect the plaintiff's claim for damages. It did not appear but that the daughter would pay the whole debt."

the mortgage and keep the horse, or maintain trespass against the mortgagee for taking the horse by virtue of the mortgage.¹

7. *Where the owner has parted with his right of possession.*

§ 544. The general owner may so part with his right to the possession of his property as not to be able to maintain trespass for an unlawful taking of it, though his general title remains unimpaired. The law gives him an action for the injury thus done him; but he cannot maintain trespass, which we have seen lies only for an injury to the possession.² * If A. permit his goods to remain with B. for his own use, and B. deliver them to C. to carry to another place, trespass does not lie by A. against C., for the reason that B. had the goods by delivery from the owner. Again, if a man hire a horse to use two days, and he continue to use him the third day, trespass will not lie, although such use is unlawful, and although the owner is entitled to the immediate possession; yet being the general owner, and, as such, having a constructive possession, he might maintain trespass against a stranger

¹ Heath v. West, 8 Fost. 101; Roberts v. Wiggin, 1 N. Hamp. 73; Richardson v. Boright, 9 Vt. 368.

² Hurd v. Fleming, 34 Vt. 169; Wilson v. Martin, 40 N. Hamp. 88; Clark v. Carlton, 1 Ib. 110; Poole v. Symonds, Ib. 289; Heath v. West, 28 Ib. 101; Moulton v. Robinson, 27 Ib. 550; Marshall v. Davis, 1 Wend. 109; Nash v. Mosher, 19 Ib. 431; Newhall v. Dunlap, 2 Shepl. 180; Gay v. Smith, 38 N. Hamp. 171; 1 Chitty's Pl. 7th ed. 188-195; 2 Greenlf. Ev. §§ 613, 614, 616.

* Where an infant prevails upon another to sign a note for him, and in order to get him to do so, turns out to him furniture, with liberty to take it when he pleases, the infant cannot afterward maintain trespass against the other for taking the furniture away. In Hoyt v. Chapin, 6 Vt. 42, the defendant, on the trial in the court below, proved that the plaintiff procured the defendant to sign with and for the plaintiff a note, and to induce him to do so, turned out to him, among other property, a stove. The defendant did not at that time take the stove away, but it was then agreed that he might do so whenever he pleased. The note not having been paid, the defendant took the stove away. It was held that the foregoing facts were sufficient evidence of a license. The plaintiff then offered to prove that when the agreement was entered into he was an infant, which was held inadmissible. The Supreme Court said: "This property was turned out to Chapin, and the license granted to take it away, on a valuable consideration. It lay not in grant, but in livery. It was not void. Without now deciding how much the plaintiff must have done in order to revoke or avoid this contract, or any part thereof, or what effect it would have had on Chapin or the note, we are of the opinion that it must have been avoided by some clear and substantial act before the taking complained of, and such revocation been specially replied in order to have been admitted."

who should presume to use the horse on the third day.¹ *Lunt v. Brown*² was an action of trespass against a deputy sheriff for taking the plaintiff's mare, on an attachment against one Winn. It appeared that the plaintiff had previously purchased the mare of Winn, but that it was at the same time agreed that Winn should keep the mare until grazing time, and if, at any time before then, Winn should pay the plaintiff fifteen dollars and interest, the plaintiff would resell the mare to him. It was held that, as the plaintiff had neither possession, nor the right of possession, at the time of the alleged trespass, the action could not be maintained.*

8. *In case of bailment.*

§ 545. One who has a special property in a chattel may maintain trespass against the person who deprives him of the possession, and recover according to his interest;³ and an interest will be presumed in the absence of proof to the contrary.⁴ Where a parcel of undressed skins was delivered to a morocco manufacturer, to be manufactured into morocco, and while the skins were in an unfinished state, the owners turned them out to their creditor, who caused them to be attached and carried away, it was held that the bailee might have legally detained them until the price stipulated for finishing them was paid, and that he might maintain trespass against the persons taking them. But it would have been otherwise, if a particular time or mode of payment for dressing the skins had been agreed on, or if, at the time of taking them, the bailors had offered and agreed to allow the bailee the full price for dressing them out of moneys actually in the bailee's hands.⁵ † Where a sheriff seizes goods under an at-

¹ *Bradley v. Davis*, 14 Maine, 44.

² 13 Maine, 236.

³ *Cowing v. Snow*, 11 Mass. 415; *Gilson v. Wood*, 20 Ill. 37; *Bradley v. Davis*, 14 Maine, 44.

⁴ *Howe v. Keeler*, 27 Conn. 538.

⁵ *Burdick v. Murray*, 3 Vt. 302.

* In *Wyman v. Dorr*, 3 Maine, 183, the cattle, for the taking of which trespass was brought, had been leased for a term of years, to be taken back by the owner within the term if he should deem them unsafe in the hands of the lessee. As the term had not expired, and as no notice had been given, the action was not sustained.

† In *Cowing v. Snow*, *supra*, Snow brought an action against Cowing, in the

tachment against the property of the consignor, as a non-resident debtor, which are in the possession of a consignee who has made advances on them, he is liable as a trespasser in an action therefor brought against him by the consignee.¹*

court below, for taking and carrying away a barrel of flour. The flour had been purchased for Cowing in New York, by one Barstow, the master of a sloop, of which Snow was part owner, and agent for the other owners. The defendant had advanced eight dollars with which to buy the flour, Barstow agreeing to make up the deficiency should it cost more. On the return of the sloop from New York, the flour, which was marked with the initials of the defendant's name, was placed in a public warehouse, with directions from Barstow to Snow not to deliver it until the freight and balance due him on the purchase were paid, and of this the defendant was informed. The defendant, notwithstanding, took the flour away without the knowledge of Snow; but he called on another of the owners and inquired for Snow, observing that he would pay what was due as soon as a bill was presented. The balance due Barstow was one dollar and eighty-five cents, which Snow had paid to Barstow before he brought the present action. After the action was brought, the defendant offered to pay Barstow, but he refused to take the money, and referred him to Snow. Subsequently the defendant left with another of the owners one dollar and seventy-five cents, requesting him to settle the bill, and agreeing to make up any deficiency, but Barstow would not take it. Judgment having been rendered for the plaintiff in the court below, the Supreme Court, in affirming it, said: "It is very clear that Barstow, the master of the vessel, had a lien upon the barrel of flour for the freight and for the balance of its price due to him. And admitting the general property to have been in Cowing, he could not legally take it out of the hands of Barstow until he had paid or tendered the sum due. The act of taking, therefore, was a trespass, for which Cowing was liable in damages. The only question is, to whom was he liable? And upon this question we are inclined to think, as it was delivered into the special custody of Snow, with directions not to deliver it until the freight, &c., was paid, he had such a special property as would entitle him to the action. The tender after action commenced cannot affect this question."

"We understand the law to be well settled that in cases of bailment, unless the bailee has the absolute right to retain possession of the property for a definite time, the action of trespass against a wrong-doer may be brought either in the name of the bailor or bailee" (Redfield, C. J., in *Stroff v. Adams*, 30 Vt. 221; *Brownell v. Manchester*, 1 Pick. 232; and see *Neff v. Thompson*, 8 Barb. 213).

Where cattle were delivered by A. to B. under an agreement that the latter should keep them for one year, and have all that they sold for over the first cost and interest, it was held that B. had such a qualified property in them while they were in his possession as might be attached by his creditors, but not after their redelivery to A. B.'s right to payment for the year's keeping becoming then a personal right only, unaccompanied by any lien, possession, or right of control to give him property in the cattle (*Megee v. Beirne*, 39 Penn. St. R. 50).

¹ *Brownell v. Carnley*, 3 Duer, 9.

* In *Brownell v. Carnley*, *supra*, the court said: "We are all of opinion that there must be judgment for the plaintiff. The legal title of the goods at the time of their arrival was vested in him, not merely by the terms of the bill of lading, but by virtue of his antecedent advances. He had then an absolute right to sell them, and to perfect the sale by a delivery to the purchaser; and this not only for the purpose of reimbursing his advances, but with a view to his commissions upon the sale, since, according to the known custom of merchants,

§ 546. If the bailee of goods have a right to them for a given time, trespass will not lie by the general owner against a third person who takes them away before the expiration of the bailee's term.¹ * Where a person allowed another to take a number of cows and sheep, which the other agreed to return to the owner within one year, with the increase, and to be answerable for such as might be lost, destroyed, or not redelivered within the year, with interest on the value, it was held to be a hiring for a valuable consideration, and not a naked bailment, and that the owner of the animals could not maintain trespass against a person who took them away from the person who had the custody of them under the aforesaid agreement.² In an action of trespass for taking a pair of oxen and a yoke, it appeared that the plaintiff was the owner of the property; that he had hired it to one Clark for a given time, which had not expired when it was taken by the defendant, but that the same was then in the actual custody of Clark. It was urged that the possession of the property by Clark under the agreement was for every purpose, except the use, the possession of the plaintiff. The answer to this was, that if the use had been merely by the gratuitous permission of the plaintiff, he might have maintained the action as being in the constructive possession;

it was doubtless to secure these commissions that his advances were made. The seizure of the goods by the defendant was, therefore, a plain violation of his legal rights. It not merely prevented their exercise, and deprived him of the benefits he meant to secure, but, if continued, might have resulted in an actual loss of the moneys he had advanced. A decision more at variance with the understanding, and more hostile to the interests of merchants, could not well be made, than to hold that the prior rights of a consignee, having a title and a lien, are liable to be thus sacrificed, at the instance of a general creditor of the consignor. * * * * Even had the plaintiff in this case been only an ordinary pledgee, having no title to the goods, and no power of immediate sale, but merely the right of retaining the possession for his ultimate security, we must still have held that the conduct of the defendant in depriving him of this possession was unlawful, and not justified by the process under which he acted."

¹ Neff v. Thompson, 8 Barb. 213; but see Gibson v. Chillicothe Bank, 11 Ohio, N. S. 311.

² Putnam v. Wiley, 8 Johns. 432.

* One having a special property in chattels forfeits his interest by putting them to a different use from that which the contract allows (Briggs v. Oaks, 26 Vt. 138; Swift v. Moseley, 10 Vt. 208).

but that where, to enable the bailee to have the use, he must have the actual custody for a certain time, and he has paid a consideration therefor, then the possession is in the bailee exclusive of the owner; and that, in the present case, while the contract was in force, the plaintiff would have been guilty of a wrong to Clark had he attempted to control or use the property let to him.¹ And in trespass for taking a horse let to hire from the custody of the hirer, it was held that as the plaintiff, at the time the horse was taken, had neither the possession, nor the right of possession, the action would not lie, but that the remedy was trover.² *

¹ *Soper v. Sumner*, 5 Vt. 274; *Ward v. Macauley*, 4 T. R. 489; *Hall v. Pickard*, 3 Camp. 187; 2 *Ib.* 464.

² *Clark v. Carlton*, 1 N. Hamp. 110.

* *Wilson v. Martin*, 40 N. H. 88, was an action of trespass against a deputy sheriff for attaching two harnesses belonging to the plaintiff, upon a writ against one Morrison, as the property of Morrison. It appeared that the plaintiff had left the harnesses with one Page to be cleaned and oiled, which had been done, and that Page refusing to give them up until he was paid for his labor, it was arranged between him and the defendant that they should remain in Page's possession until his claim for labor was paid, the defendant agreeing that if it became necessary, or if he should desire to take them away, that he would first pay to Page the amount of Page's claim. The action was brought within two days after this arrangement, the plaintiff having first demanded the harnesses of the defendant, and he having refused to give them up. It was urged in argument that, although not liable for the original attachment, the defendant became liable by the subsequent demand of the plaintiff for the harnesses and his refusal to surrender them. The court said: "If we are correct in the view that the lien of Page having been asserted, gave him a vested right to retain the possession of the harnesses until that lien was satisfied, or the possession parted with, and the lien had not been satisfied or the possession parted with by Page, as the case distinctly finds, then the plaintiff, at the time of the demand, had no right to the possession of the harnesses, and, of course, could not be injured by the refusal of the defendant to yield to him what he was not entitled to have. The plaintiff not having, at the time of the alleged injury to the harnesses by the defendant, either the actual or constructive possession of them, but the same being then and still in the hands of his bailee, who had, and still has, a vested right to retain them until the satisfaction of his lien thereon, there must be judgment on the verdict, properly taken in the court below, for the defendant."

Muggridge v. Eveleth, 9 Metc. 233, was an action of trespass against a sheriff for attaching a schooner on process against one Davidson. It was proved that the schooner formerly belonged to Davidson, but that he sold and delivered her to the plaintiff, and that the latter immediately let her by parol to one Gerrish, who, at the time of the attachment, was in possession of the schooner, claiming to be hirer and master, and exercising over her the whole control. It was held that as the plaintiff had neither the actual nor constructive possession of the schooner at the time of the alleged trespass, or at the commencement of the action, he was not entitled to recover. Hubbard, J.: "Suppose, in this case, that the plaintiff, instead of commencing an action of trespass, had brought replevin against the sheriff, and had been put in possession of the schooner, he could not retain it as against Gerrish; and if he should refuse to deliver it to him, Gerrish

§ 547. Although an agister has no lien for the keeping of animals, unless it is so expressly agreed, yet he may maintain trespass against a stranger for taking them away. *Bass v. Pierce*¹ was an action for breaking and entering the plaintiff's close and carrying away a cow in the plaintiff's keeping. The evidence showed that the plaintiff was hired by one Gould to pasture the cow, and that while she was so pastured, Gould had the use of her for his family, and drove her from the pasture to his house at night to be milked, and back to the pasture in the morning. The defendant took the cow from the plaintiff's field after she had been put in by Gould.

being guilty of no laches, could maintain an action against the plaintiff for damages for not delivering it; or he might, perhaps, maintain replevin. Two persons claiming a chattel under distinct titles, cannot lawfully be entitled to the possession at the same time. The right of possession of one must be paramount, and he only can maintain trespass in case of a wrongful taking of it by a third person. In the present case, Gerrish was lawfully entitled to the possession of the schooner at the time of the attachment, and he, therefore, and not the plaintiff, can maintain an action of trespass for the taking."

In the foregoing case, the plaintiff's counsel argued that it did not stand on the same ground with ordinary actions of trespass, because the suit was against an officer, who claimed to hold the schooner as the property of a third person. But the court said that they did not know of any such legal distinction. The action was for a tort alleged to have been committed against the plaintiff. It was, therefore, incumbent upon him to prove in himself a right to the possession of the property taken, otherwise he had not sustained the injury of which he complained. And if he did not prove it, though the defendant might be a wrong-doer in consequence of taking the property, still for such wrongful act he would be responsible, not to the plaintiff, but to the person who was unlawfully dispossessed of his property. It was not, then, sufficient for the plaintiff to show that the defendant was a wrong-doer, but he must show that the wrong was done to himself. In the same case it was said by the plaintiff's counsel that the defendant's act was the destruction of the entire thing, and that, therefore, the plaintiff could recover, because the general property was in him. To this the court replied that the seizure of the property was neither an actual destruction of it, nor was it to be so implied. That if it were, then replevin would not lie, because the thing itself could not be replevied. But that here the schooner could be replevied by a person wrongfully dispossessed, and his writ would be sustained. It was also contended that by the taking of the schooner the charter was determined, and so the plaintiff had a right to resume the possession of her, and consequently had a constructive possession, and might therefore maintain the action. But the court said that the parol letting of the schooner to Gerrish being valid, the contract of letting was not determined by the unlawful act of the defendant; that in a suit by the present plaintiff against Gerrish on the contract of charter, proof that the schooner had been unlawfully taken out of Gerrish's possession, without the act or co-operation of the plaintiff, would be no bar to a recovery; that such a disposition was no determination of the contract; and that the party who was dispossessed unlawfully must repossess himself of the property or obtain its value (citing as to the validity of the parol letting of the schooner, *Taggard v. Loring*, 16 Mass. 336; *Thompson v. Hamilton*, 12 Pick. 428; *Vinal v. Burrill*, 16 Pick. 406; *Bixby v. Franklin Ins. Co.* 8 Pick. 86).

¹ 16 Barb. 595. See *Grinnell v. Cook*, 3 Hill, 485.

It was held that the plaintiff was an agister of the cow while she was in his pasture, and entitled to maintain the action.*

§ 548. The general owner of personal property cannot maintain trespass against one who has wrongfully taken the property from the possession of a pledgee, because the former is not entitled to the possession.¹ Every pledgee has, at common law, an absolute right to retain the possession of the property pledged, not only against the pledgor, but against every person not showing a paramount title, until the conditions of the pledge have been fulfilled. To authorize an interference with his possession, in any other case, an express statutory provision changing the rule of the common law is necessary.†

§ 549. Persons who have only a special property in goods may maintain an action for their injury—such as a carrier, a

¹ Gay v. Smith, 38 N. Hamp. 171.

* In Bass v. Pierce, *supra*, the defendant's counsel contended that the fact of Gould's taking and keeping the cow at night, was conclusive evidence that the plaintiff was not bailee. The court replied, that it was true he was not bailee while Gould had possession, but that he was such when the cow was in his pasture, under the agreement.

† A pledge, though like a mortgage, a security for a debt, is a mere bailment—a delivery of articles to be kept until the debt is paid; and it passes to the pledgee a special property only, while the general property remains in the pledgor. There is, consequently, a marked difference between these two kinds of securities. Possession is essential to a pledge, but not to a mortgage. The mortgage is valid if duly recorded, though the mortgagor keeps possession of the property, either by agreement or by the permission of the mortgagee.

In New York, it is enacted (2 Rev. Sts. 366, § 120) that, “when goods or chattels shall be pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.” It has been held, under the foregoing statute, that where property is pledged for debt, and in the possession of the pledgee, a sheriff, having an execution against the pledgor, may, by virtue thereof, take the said property out of the hands of the pledgee into his own possession, and remove it and sell the right and interest of the pledgor therein; the New York Court of Appeals being equally divided on the question. But, in such case, the pledgee has a right to the possession of the property until the purchaser redeems it (*Stief v. Hart*, 1 N. Y. R. 20). But the New York statute, by its express words, is confined to a sale under an execution; and thus, a sale not of the goods themselves, but merely of the interest of the pledgor—that is, his right to redeem them upon payment of the debt for which they are pledged. The reasons upon which the statute is founded are not applicable to a seizure of goods under an attachment (*Brownell v. Carnley*, 3 Duer, 9, per Oakley, Ch. J.).

mechanic, to whom they have been sent to be repaired, a warehouse keeper, auctioneer, shopkeeper, or the master of a vessel;¹ the test being that the plaintiff must have had actual possession, or the right to take actual possession, at the time the act complained of was committed.² The captain of a fly-boat, who was hired by a canal company at weekly wages, was accordingly held competent to maintain trespass for cutting a rope fastened to the vessel by which it was towed along an inland navigation, although the vessel and the rope were the property of the company.³ Where a person hired a slave to another, it was held that the owner of the slave could not maintain trespass for an injury inflicted upon the slave during the unexpired term for which the slave was hired.⁴ And where a slave was given to a person in trust for another, who was a married woman, and the former, by the terms of the trust, had possession of the slave, it was held that the trustee was the proper person to bring an action for an injury to the slave resulting in his death.⁵ But an instrument under seal, executed by A. and wife only, releasing to B. their claim to certain chattels, with a reservation that they shall be held by C. & D., as trustees, for special uses, is not sufficient evidence of property or possession in C. & D. to enable them to maintain an action for the injury of such chattels.⁶ *

9. *Where there has been a conditional sale.*

§ 550. When personal property has been sold and delivered upon condition that the vendee make payment within a specified time, and it is attached in the possession of the

¹ Williams v. Millington, 1 H. Blk. 81; Colwill v. Reeves, 2 Campb. 576; Pitts v. Gaince, 1 Salk. 10; Martini v. Coles, 1 M. & S. 140.

² Lewis v. Carsaw, 15 Penn. St. R. 31; Corfield v. Coryell, 4 Wash. C. C. R. 371.

³ Moore v. Robinson, 2 B. & Adol. 817. ⁴ M'Farland v. Smith, Walker, 172.

⁵ McRaeny v. Johnson, 3 Florida R. 520.

⁶ Kennedy v. Waller, 2 Hen. & Munf. 415.

* Trespass for an injury to personal property is transitory (Brice v. Vanderheyden, 9 Wend. 472).

vendee by one of his creditors, as the vendor has not the right of present possession, he cannot maintain trespass for the property against the attaching creditor of the vendee.¹* It has, however, been held that, if the condition has not been fulfilled, the vendor may maintain an action against the wrong-doer who has the goods in his possession and refuses to surrender them, notwithstanding the conditional vendee has previously recovered damages for the taking.²†

§ 551. The conditional vendee of personal property has

¹ Hurd v. Fleming, 34 Vt. 169.

² Hasbrouck v. Lounsbury, 26 N. Y. 593.

* In Bigelow v. Huntley (8 Vt. 151), the plaintiff was a conditional vendor, and it was conceded that the vendee was, by the contract, entitled to possession till the time of payment expired, and the property was attached before the time arrived. The court were divided. A majority held that the plaintiff was entitled to recover. But the judgment was put principally on the ground that the property had been previously attached by another creditor, and the plaintiff had received it to the officer, and could recover against the last officer, upon his title as receptor to the first. The action in that case was trover.

† In Hasbrouck v. Lounsbury, *supra*, the plaintiff agreed with one Vandermark to sell him a horse for \$65, which was to be paid, with interest, nine months thereafter. Vandermark was to have the possession of the horse, but the horse was to remain the property of the plaintiff until paid for. The defendant took possession of the horse, with full knowledge of the foregoing facts, by virtue of a judgment against Vandermark, he having bought the horse at the execution sale. Vandermark thereupon sued the defendant, and obtained judgment against him, on the ground that the horse was exempt from levy and sale, which judgment was paid. The time having expired in which Vandermark was to pay for the horse, and payment not having been made, the plaintiff demanded the horse of the defendant, and on his refusal to deliver the same, this action was brought, and judgment obtained therein against the defendant, which was affirmed by the Court of Appeals, on the authority of Herring v. Hoppock (15 N. Y. R. 409). Balcom, J., in delivering a dissenting opinion (in which Emott and Rosekrans, JJ., concurred), said: "It seems to me to be very plain that the recovery by Vandermark was a bar to the plaintiff's action. The defendant was a stranger to the agreement under which the plaintiff delivered the horse to Vandermark; and it is not at all material that he undertook to justify the taking and conversion of the horse by virtue of an execution against Vandermark's property, or that the latter recovered the value of the horse, on the ground that it was exempt from levy and sale on execution; for the defendant had no more right to take and sell the horse on the execution, as Vandermark's property, than as the property of a third person; and the case is the same that it would have been if the execution had been against the property of a stranger, who never had any interest in the horse. It is only when the defendant can successfully defend an action brought by the bailee, that the bailor can sue, notwithstanding the prior action by the bailee. When the bailee recovers, he holds the money recovered in trust for the bailor, in lieu of the property. Now, as either the plaintiff or Vandermark had the right to sue the defendant for converting the horse, the judgment recovered by Vandermark was a bar to this action. It would be very unjust to the defendant, were the law otherwise, for he would be compelled to pay for the horse twice, and be legally harassed with two actions, when he took and sold the horse in good faith, supposing it was the property of Vandermark, and liable to seizure on execution against his property."

an assignable interest therein. If, however, he sell absolutely, in disregard of the claim of the original owner, the latter may treat the bailment as terminated, and resume possession at once, using no violence, and doing no unnecessary damage;* but not after a tender of the full amount due, made by the vendee of the original purchaser. In *Vincent v. Cornell*,¹ oxen were sold to be returned on a certain day unless a given sum was paid. The buyer sold the oxen, and the court held that he had a right to dispose of his possession with his interest. *Bailey v. Colby*² was an action of trespass for two steers alleged to belong to the plaintiff. It appeared that the defendant had sold the steers to one Young, on condition that they should remain the defendant's property till Young paid for them, and that Young sold them to the plaintiff; that the plaintiff afterward offered to pay the defendant for the steers, but that he declined payment, unless he was paid in addition what Young owed him on all other matters between them. It was held that, upon a tender by the plaintiff, to the defendant, of the amount of purchase money due, the property vested absolutely in the plaintiff, and that the defendant, by interfering with it, became a trespasser.†

¹ 13 Pick. 294.

² 34 N. Hamp. 29.

* In *Sargent v. Gile*, 8 N. Hamp. 325, the plaintiffs delivered furniture to one Wilson, upon a contract that he should keep it six months, and if in that time he paid for it he was to have it; otherwise he was to pay an agreed price for the use of it. Wilson sold the furniture to the defendants, who knew nothing of the contract, but bought the property supposing it to be his. It was held that the bailment was ended and that the bailor might recover the goods in trover. *Lovejoy v. Jones* (10 Fost. 165), was a similar case.

† In this case the court said: "The interest of Young was not a simple bailment, terminable at the pleasure of the parties, and resting on no personal confidence, but was connected with a contract which gave him the right to keep the steers and use them till he paid for them, if he did that in a reasonable time, and to the absolute title to the property whenever such payment should be made. He had an assignable interest in the steers, or, in other words, a right to sell the property subject to the claim of Colby the defendant. If his sale was of his interest only, he had done no wrong, and his assignee, the plaintiff, was entitled to hold the property, as he held it by his contract; and Colby had no right to resume the property from Bailey, any more than he had from Young himself, until the reasonable time for payment had passed, and until after he had requested payment without success. When Bailey, the plaintiff, went with Young to Colby, before any demand made for payment, and tendered him the balance due for the steers, the property became at once vested in Bailey, and Colby had

10. *In case of agency.*

§ 552. An agent in possession of personal property may maintain trespass for its removal,¹ or the action may be brought by the principal.² * In trespass for taking and

no longer any right to interfere with it, and he was a trespasser, as any stranger would be, for taking it away. Colby had no right to ask payment of any other claim he had against Young; and Bailey, to perfect his title, was bound only to pay the amount Colby had agreed to take for the steers. But if the sale by Young was a sale of an absolute title to the steers, in disregard of the claim of Colby, Colby might treat the contract with Young as violated, and the bailment at an end, and resume the property at once, doing no unnecessary damage, and using no violence, without liability for any damage for the taking or for an entry on land of Young or Bailey, to obtain it."

"There is a large class of bailments where the bailment is accompanied with other contracts or stipulations, which affect its character, and give to the bailee other rights not incident to a simple bailment, and where there is no personal confidence and none of the characters of an estate at will, and where it would be entirely consistent with the analogies existing in the case of real estate to hold that the bailee has an assignable interest which may be transferred to a third person, and where such an assignment would be enforced and protected as between the parties, and as against all persons whose interests are not injuriously affected by the transfer. Of the cases which present themselves as falling within this class, would be the case of a pledge or pawn, where there is ordinarily nothing like personal confidence, and the contract is in no sense determinable at the pleasure of a party, but the bailee has an interest, or, as it might be said, a *quasi* estate, in the goods till they shall be redeemed. In the same class, would fall all the various cases of lien, where the bailee has a right, as against the bailor, to insist upon the possession of the property until the lien is duly discharged by payment, or the performance of other conditions."

"The law seems to be well settled in the case of a pawn, that the pawnee may sell and assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn to another person, without, in either case, destroying or invalidating his security. But if the pledgee should undertake to pledge the property (not being negotiable securities), for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he was absolute owner, it is clear that in such case, he would be guilty of a breach of trust, and his creditor would acquire no title (beyond that held by the pawnee, says Story, Bailm. 215). It would admit of controversy, whether the creditor could retain the pledge till the original debt was discharged, and whether the owner might not recover the pledge, as if the case were a naked tort without any right in the first pledgee" (Bell, J., in *Bailey v. Colby*, 34 N. Hamp. 29, citing *Southerin v. Mendum*, 5 N. Hamp. 420; *Whittemore v. Gibbs*, 4 Fost. 484; *Mores v. Conham*, Owen, 123; *Ratcliff v. Davis*, 1 Buls. 29; *Jarvis v. Rogers*, 15 Mass. 389, 408; *Man v. Shiffner*, 2 East, 523; *M'Combie v. Davies*, 7 East, 6, 7; *Goss v. Emerson*, 3 Fost. 42).

¹ *Craig v. Gilbreth*, 47 Maine, 416.

² *Gillett v. Ball*, 9 Penn. St. R. 13.

* Where A. agrees to build a barn for B. by a specified time, the timber to be taken from B.'s land, A. has not such a property in the timber cut and drawn for the purpose of finishing the barn that it may be taken in execution for his debts. *Gallup v. Josselyn*, 7 Vt. 334. was an action of trespass against a deputy sheriff for attaching and carrying away boards and timber on a writ against one Shipley. It was proved that some time previous to the attachment, the plaintiff had entered into a written contract with Shipley, by which Shipley was to build a barn on the land of the plaintiff, with permission to use timber upon the land of the plaintiff sufficient for that purpose; that Shipley cut and took the timber from the plaintiff's land in pursuance of the contract, hired it sawed, and drew

carrying away lumber, it appeared that it was owned by one Morse, who mortgaged it to the plaintiff; that a son of Morse, as his father's agent, accompanied the plaintiff to the mill where the lumber lay for the purpose of giving him possession, and that the lumber was in charge of one Braynard, who was requested by the plaintiff to take care of it for the plaintiff, as he had before done for Morse, to which Braynard made no objection. It was held that the plaintiff had sufficient possession to maintain the action against the defendant,

it from the mill on to the land of the plaintiff, to the place where it was attached by the defendant; that Shipley had partly completed the barn, and was at work thereon when the property was attached; that the timber and boards at the time of the attachment were lying within twenty feet of the barn, for the purpose of being used in its construction, and that the plaintiff was advising in relation to the building of the barn up to the time of the attachment, which was four or five days after the time fixed by the contract for completing the barn. Judgment having been rendered for the plaintiff in the County Court, the Supreme Court, in affirming the judgment, said: "It may be very questionable whether, if Gallup had sold the land whereon the timber grew, it would not have so far rescinded the contract as that Shipley would have been under no obligation to fulfil. At all events, Gallup would have been liable for all damages, and if Shipley had procured the timber elsewhere, Gallup would have been under obligation to pay for the same. If the timber, either before or after it was sawed, had been burnt up without fault, it would have been so far Gallup's loss as that Shipley might, for the same purpose, have procured more from the same lot. It follows that the timber, when cut from the stump, was the property of Gallup. It could not thereafter become the property of Shipley by the labor bestowed on it in manufacturing it for the use intended. So long as it could be traced and identified it still remained his. For at no period previous to the taking do we find any act of the plaintiff manifesting his intention to part with the property. The case from Johnson, of the owner of timber being allowed to recover for the property when manufactured into shingles, is a very strong case to show that the owner is not divested of his ownership by any alterations the property may undergo, so long as it can be identified. It is true that in that case the property, *i. e.* trees from which shingles were manufactured, was taken without the consent of the owner. But I apprehend that the principle on which the decision was founded is applicable to this case. If the owner of timber trees is permitted to retain his ownership when it is thus manufactured into boards or shingles, when it is taken for that purpose without his consent, it is difficult to see why he should be divested of his ownership when taken with his consent to be manufactured for his use. Upon the construction of this contract, and from the nature of the case, we are of opinion that the property of the boards and timber for the taking of which this action is brought, was in the plaintiff. The possession of Shipley was that of an agent to manufacture for the plaintiff's use, and he had no other possession than he had of the team for drawing the same: nothing more than every hired man or agent has of property intrusted to him to use in the business of, and for the benefit of the owner. If Shipley had converted it to any other use, he would have been immediately liable, and if any one took it from Shipley while in the employ of the plaintiff, in completing the job, such person would be immediately answerable to the plaintiff, and it would be a direct injury to the property of the plaintiff in the hands of his agent, and of course an injury to the possession, for which the action of trespass is the appropriate remedy."

who showed no title.¹ * In an action of trespass for taking flour from a mill, it was proved that grain was purchased by an agent of the plaintiff with money furnished by the latter, and the flour in question made therefrom and set apart in the

¹ *Morse v. Pike*, 15 N. Hamp. 529.

* *Mitchell v. Stetson*, 7 Cush. 435, was an action of trespass against a deputy sheriff for attaching timber and other personal property on a writ against the father of the plaintiff. The plaintiff was the owner of the land from which the lumber was taken, having purchased and paid for it by his own promissory notes. By an agreement between him and his father, the latter was to cut off and sell the timber standing on the land, and out of the proceeds to pay for the labor and other charges attendant thereon, and to appropriate the balance towards payment of the notes given for the purchase money. If any surplus was left, it was to be paid over to the plaintiff. At the trial in the Common Pleas, the jury found for the plaintiff, and the Supreme Court, in overruling exceptions to the verdict, remarked that the most conclusive test as to the right of the plaintiff to recover the full value of the property at the time of the trespass was to be found in the consideration that, upon the evidence in the case, it was clear that he could have maintained replevin for the property taken by the defendant. The fallacy of the argument on the part of the defendant consisted in regarding the services of the father in cutting and drawing the lumber as creating in him a right of property to the lumber itself. But there was no agreement to that effect between the parties. It was the common case of principal and agent. No property was vested in the father by the arrangement between him and his son. The former was to be paid out of the property of the principal for his own labor and the charges of executing the agency, but he acquired no title to the property which was intrusted to his care. The right to deduct from the proceeds of the property, when sold, a sum sufficient to pay for the labor and expense laid out in preparing it for market, was only one mode of paying a debt for which the plaintiff was liable as principal, but it did not change the legal relation of the parties, or vest any title to the lumber in the agent as against third persons.

Trout v. Kennedy, 47 Penn. St. R. 387, was an action of trespass for taking and carrying away lumber, the title to which the plaintiff alleged he had acquired at a sheriff's sale of the property of one Brooks. It appeared in evidence that Brooks, being the owner of a saw-mill, and also of the timber standing on certain land, agreed to give the use of the mill to the defendant for the purpose of manufacturing the timber into lumber. By the agreement, the defendant was to cut the logs, get them to the mill, saw them out, pile the boards, and give to Brooks one-half the boards, to be divided in the pile. Under this contract, two hundred and seven thousand feet were manufactured and piled, but the defendant not only refused to make any division, but removed from the mill a considerable portion of the lumber, transporting it about three miles in the direction of the market. After this had been done, an execution was issued against Brooks, under which the sheriff levied upon his interest in the two hundred and seven thousand feet of lumber, and made a sale, returning that he had sold one hundred and three thousand five hundred feet to the plaintiff. It was held, that nothing in the agreement vested in the defendant any interest so long as the lumber remained undivided; that it simply constituted him the agent of the owner to cut the logs, haul them to the mill, saw them into boards, and place the boards in piles, and that the provision for payment was equivalent to an allowance by the principal to the agent of one half the product of his labor. Held further, that the plaintiff, by his purchase at the sheriff's sale, acquired title to the whole of the interest of the owner, and not to the half of the number of feet returned as sold, and that as the taking was under a claim of right to the whole, the hauling away was not a succession of disconnected trespasses, but one continuous act, for which damages were recoverable in a single suit.

mill for delivery to him. It was held that the plaintiff was entitled to recover, although it was proved that he said he would look to his agent for the money furnished.¹ *Boynton v. Turner*² was an action of trespass for upsetting and breaking the stage coach of the plaintiff's intestate. It appeared that the minor son of the intestate hired a horse and chaise to carry home his sick brother, telling the livery stable keeper of whom he hired it that he could not then pay him, and that his father received all of his wages; and that upon telling his father how he had obtained the conveyance, his father directed him to pay for the same out of his wages. The chaise, while in the son's possession, having been upset and badly broken by a stage coach driven by the defendant, the question was, whether the intestate had such a property in the chaise as would entitle him to maintain the present action. The Supreme Court, in holding the affirmative, said: "The case is to be considered as if the intestate had given his son a previous authority to hire the horse and chaise. This ratification of his son's conduct had relation back to the hiring, and so the special property must be considered to have been in the father from the beginning. He was then liable to the general owner, and therefore entitled to this action to indemnify himself for such liability."

§ 553. The lien of a factor continues only while he has the possession. Therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass, if they are forcibly taken; for his possession continued notwithstanding the lien; and none but the factor himself can set up this privilege against the owner. *Holly v. Huggefurd*³ was an action of trespass against a deputy sheriff for attaching the goods of the plaintiff, while in the custody of one Lobdell to whom the goods had been consigned to sell on commis-

¹ *Thomas v. Snyder*, 23 Penn. St. R. 515.

² 13 Mass. 391.

³ 8 Pick. 73.

sion. The principal objection that was made to the verdict, which was for the plaintiff in the court below, arose from the supposed lien which Lobdell had on the goods attached as factor, he having accepted drafts drawn by the plaintiff, the balance at the time of the attachment being in his favor. It was argued that his lien so destroyed the right of possession in the plaintiff, that he could not maintain the present action. It was, however, held that the objection was not tenable.*

11. *Tenants in common.*

§ 554. Although an action of trespass may be maintained by a tenant in common of goods against his cotenant,¹ yet, as tenants in common are seized or possessed of the subject

¹ Dailey v. Grimes, 27 Md. 440.

* The right of lien at common law was originally confined to cases where persons, from the nature of their occupation, were under obligation, according to their means, to receive and be at trouble and expense about the personal property of others, and was limited to certain trades and occupations necessary for the accommodation of the public—such as common carriers, innkeepers, farriers and the like. But in modern times, the right has been extended so far, that it may now be laid down as a general rule, to which there are few exceptions, that every bailee for hire, who by labor and skill has imparted an additional value to the goods of another, has a lien upon the property, for his reasonable charges in relation to it, and a right to retain it in his possession until those charges are paid. This includes all such mechanics, tradesmen and laborers, as receive property for the purpose of repairing, cleansing or otherwise improving its condition (Wilson v. Martin, 40 N. Hamp. 88).

Where a person, who has agreed to transport goods, after part performance, fails to fulfil his contract, he cannot keep the goods, on the ground of a lien, for what he has done (Hodgdon v. Waldron, 9 New Hamp. 66). A lien for the price of labor and services performed, about goods bailed, is in the nature of an implied contract that the party who has performed the labor shall hold the goods until he receives the pay for doing what he had undertaken to perform about them at the request of the owner. But if he has not fully performed what he undertook to do, such a contract cannot fairly be inferred. And besides, to allow him to hold the goods, might, in effect, in many cases, deprive the other party of the right to have the damages for the non-performance of the contract deducted. He might be compelled to pay the amount demanded in order to gain possession of his goods. According to decisions in some of the States, he would not be entitled to compensation, and, of course could have no lien. In New Hampshire, although he may recover the value of the benefit his employer has received, the other party is entitled, if he elects, to have the damages he has sustained by reason of the non-performance of the residue deducted; and those damages being of uncertain amount, it is not only uncertain what the bailee is entitled to receive, but whether he will in fact, on the adjustment, be entitled to receive anything. Under such circumstances, he cannot be permitted to hold the goods by virtue of a lien, until this is settled (Britton v. Turner, 6 N. H. 481).

As to liability of principal for wrongful acts of agent, see *ante*, § 49.

of the tenancy *per my et per tout*—by the moiety and by all,—and each has possession as well of every part as the whole, one tenant in common cannot maintain such an action against his cotenant, merely for taking and holding the thing held in common. Littleton¹ says: “If two be possessed of chattels personal in common, by divers titles, as of a horse, an ox, or a cow; and if one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong, to occupy, &c., when he can see his time.” Since a right to take, and a right to resist the taking, cannot exist in different persons at the same time, it follows that a tenant in common of personal property cannot take the property by force from his cotenant. But if he can get possession without a resort to force, he can lawfully hold the property and protect his possession by force.²

§ 555. One tenant in common can sell and convey his interest in the joint property, and the purchaser will become a tenant in common with the other owner, subject to the rights and obligations of the person whose interest he has purchased. If one tenant in common sells the entire chattel without the consent of the other tenant, the purchaser acquires a right to the possession of the whole, the possession of one, being the possession of both. The other tenant is not divested of any right by such sale. He may, at his election, affirm the sale and sustain an action against his cotenant for a moiety of the consideration received, or bring an action of trespass. If he do the latter, he will not thereby affirm the sale; though it is probable that a recovery and satisfaction in trover against the cotenant, would have the effect to vest the whole chattel in the purchaser.³ *

¹ Litt. 200, *a*, § 323; and see Arch. Civ. Pl. 39; 1 Chit. Pl. 170; Ham. N. P. 250.

² Coke on Litt. 199, *b*; Hemdon v. Bartlett, 4 Porter, 481; King v. Phillips, 1 Lansing, 421.

³ Welch v. Clark, 12 Vt. 681.

* An executory agreement made by one of two owners of personal property to sell it, does not disprove their joint ownership or bar their joint recovery in an ac-

§ 556. When personal property is indivisible, and for that reason cannot be partitioned, there is no way in which one of several owners can have the use of it, if the other, being in possession, refuses to surrender it.¹* As a general rule, the property held in common cannot be divided unless by the consent of all the owners. One tenant in common cannot set apart a portion of the common property for his cotenant, and hold the remainder as his own, however just may be the division. This must be so, when the property held in common consists of several things of different qualities or value, or where it embraces but one thing which cannot be divided without destroying its nature or identity.² Where, however, personal property, severable in its nature, in common bulk, and of the same quality, is owned by several as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it without being liable to them in an action for the conversion of the common property.³† So, likewise, an entire change

tion of trespass for taking and carrying it away. The question in such case, is not whether both the plaintiffs made a contract to furnish the property, but whether they both owned it, and had the possession, or a right to the immediate possession, when the alleged trespass was committed (*Talmadge v. Scudder*, 38 Penn. St. R. 517).

Where wheat, belonging to two persons, is mingled in a common bin, with the knowledge and assent of both parties, they are thereby made tenants in common of it; and the disposal of the entire mass by one of the cotenants will render him liable to an action at the suit of the other (*Nowlen v. Colt*, 6 Hill, 461).

¹ *Hyde v. Stone*, 9 Cowen, 230; *Gilbert v. Dickerson*, 7 Wend. 449.

² *Forbes v. Shattuck*, 22 Barb. 568.

³ *Tripp v. Riley*, 15 Barb. 333.

* By the civil law, tenants in common were under an implied engagement to divide the property, held in common, when any one of the parties concerned desired it (*Domat*, B. 2, tit. 5). By several ancient English statutes, the same result might be attained with respect to real property by the aid of the Court of Chancery (*Coke's Inst.* by Thomas, vol. 1, p. 789, n. 20). The substance of these statutes was early adopted in New York, and is still retained.

Where, by the terms of a contract between A. and B., a crop of grain raised by B. on the land of A., is to be secured in the barn of A., and there threshed by B., and divided between them, an attachment of any part as the share of B., before the crop is thus secured, threshed, and divided, does not work a severance of the shares. If, therefore, after such attachment, A. takes the part attached and deposits the same in his barn, such taking is not a trespass as against the officer making the attachment (*Bishop v. Doty*, 1 Vt. R. 37).

† In an action of trover, for carrying away a quantity of unthreshed wheat and straw, it appeared that the plaintiff and defendant cultivated a farm on

may lawfully be wrought in a chattel by a tenant in common in possession, if the so doing is the only means of preserving it;—as in the case of the extraction of oil from a whale, which is in fact, a preservation of the common property. There the chattel is turned to its customary and profitable use—to the only use ultimately intended or valuable. And although the form is altered, the change will not prevent the other tenant from taking and using it; and without this change the property will be lost.¹

§ 557. But one tenant in common cannot lawfully do anything to the common property which may diminish its value as a whole, or injure or endanger the interest of his cotenants; such as severing and converting a portion of the growing crop of grain before it is ready for harvest or ultimate use; severing and converting part of a number of animals in the process of fattening, to be butchered for sale or food; or severing and converting a portion of any common property in the process of being improved for the benefit of the owners. In such cases, each tenant owes to the other tenants his exertions according to the nature and terms of his connection with them, for the preservation and improvement of the common property; and the property as between them, is not severable until its maturity.² In

shares; that it was the defendant's duty to harvest, thresh, and clean the wheat and to deliver one-half of it to the plaintiff at his barn on the farm, measured in the half bushel; that instead of taking all the wheat to the plaintiff's barn, to be threshed and cleaned there, the defendant was proceeding to divide it in the sheaf, and to take one-half to his own barn, and the other to the plaintiff's, when the plaintiff came, forbade the defendant's drawing or touching any of it, and caused the defendant and the men in his employ to be arrested for what they had done. The defendant got no more than his half of the whole wheat; but to be entitled to that, he was bound to thresh and clean the plaintiff's half and deliver it at his barn by measurement. If the wheat was to be considered as divided in the sheaf, then the defendant got more than his share, by the value of the labor necessary to thresh and clean the plaintiff's half. There was evidence tending to prove that the performance of this labor by the defendant was prevented by the plaintiff, who claimed the whole wheat, and took, threshed and disposed of his own half, as divided by the defendant, and took possession of and raked the field. It was held that the plaintiff, by this claim and conduct, had waived the performance by the defendant, of any further acts as a tenant in common (*Forbes v. Shattuck*, 22 Barb. 568).

¹ *Fennings v. Grenville*, 1 Taunt. 241. ² *Forbes v. Shattuck*, *supra*.

Redington v. Chase,¹ the plaintiffs owned an undivided third part of certain shot iron. The whole was taken by the defendants who had purchased the other two thirds, and mixed by them with other iron, and manufactured into various articles, so that the shot iron could no longer be traced or identified; and these articles were sold by the defendants. It was held that as the common property had been placed as completely beyond the plaintiffs' reach, as the destruction of it would have done, they were entitled to recover.

§ 558. Tenants in common of personal property must join in an action at law for the recovery of damages caused by an injury to it. In case of the death of any part owner, after the injury is sustained, the right of action survives to the surviving part owners, who must afterward pay to the personal representatives of the deceased the value of his share.²* There is a conflict of authority as to the effect of a settlement by one of several tenants in common for the wrongful taking of the common property. In New York, such a settlement has been held only to inure as a settlement of the damages belonging to the party settling.³† On the

¹ 44 N. Hamp. 36.

² *Bucknam v. Brett*, 35 Barb. 596.

³ *Gock v. Keneda*, 29 Barb. 120.

* Although the general rule is, that tenants in common of personal property must join in an action to recover for an injury, because the injury is joint, and they recover joint damages; yet the injury is not joint when the share of one tenant in common has been lawfully taken and sold; for as it respects that one, the justification is complete. In the latter case, the tenants in common do not suffer a joint injury, and they are not jointly interested in the damages to be recovered (*Lothrop v. Arnold*, 25 Maine, 136; *Melville v. Brown*, 15 Mass. 82).

Where it appears, that some of several plaintiffs were made parties without their knowledge or consent, a nonsuit will be granted as to all. In *Brown v. Wentworth*, 46 N. Hamp. 490, which was an action of trespass for destroying a lead pipe, four of the five coplaintiffs showed to the court, that the action was brought without their consent, knowledge, or authority, and asked to be nonsuited, which was done as to all the plaintiffs. It did not appear that any application to those four plaintiffs to permit their names to be used in the action, or an offer of indemnity to them had ever been made until after they had presented their petition to the court to become nonsuit.

† In this case, the court said: "It may be argued that as tenants in common must unite in an action for the conversion of their property, or the defendant may defeat the action by taking the objection in his pleadings, the release by one of the plaintiffs will of necessity defeat any action, as his release will estop him. Let us advert to some principles well settled, relating to tenants in

other hand, in Maine, the release of a trespasser by a tenant in common is said to discharge the action as to his cotenants as well as himself. *Bradley v. Boynton*,¹ in which the latter position was taken, was an action of trover brought to recover the value of certain mill logs cut and carried away by one Grant as a trespasser, and by him delivered to the defendants in payment of advances made to him. The plaintiff and one Chase being at that time mortgagees and tenants in common, a settlement for the trespass was afterward made with Grant by Chase who released him from all liability as well for himself as for his cotenants. The question raised and decided in the affirmative, was whether the settlement and release of one tenant in common bound his cotenant and transferred the property to the trespasser. The reasoning of the court was as follows: "A settlement and release of a trespass necessarily operates as a transfer of the property to the trespasser. And when a release of

common of personal property. One tenant in common has no authority to dispose of the property, so as to divest the title of his cotenant. If he cannot sell the property and make a good title to the vendee, what authority can he have to release to a wrong-doer the cause of action which belongs to the tenants in common, and which would not survive to him alone? What right has he to settle the action, and thus deprive his cotenant of any remedy? If he settles the action, and gives a release for a valuable consideration, this would be equivalent to a sale of the property, and he has no power to sell his cotenant's share. It may be said that a cotenant may defeat the action by refusing to become a party to it. I apprehend that this is not so. If he should refuse to unite in the action, the law would, I think, afford redress to the other cotenant. I will not stop to inquire in what manner this could have been done prior to the code. Now, if the consent of any one who should join in the action, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. In the present case, the plaintiffs had united in the action; and in my opinion, one of them could not release, discharge, or settle the action, so as to defeat the right of the other to proceed and recover his portion of the damages. He could settle for his portion of the damages; but he could no more settle for the portion of his cotenant, than he could sell the share of his cotenant. * * * If the trespasser may settle with one of the tenants in common, before action, for his damages, without affecting the right of the other cotenants to sue, I can see no reason why they may not settle with one of the tenants, after the action is brought, without affecting the right of the other cotenants to proceed in the action. And as a tenant in common has no right to sell the entire property, he has, in my opinion, no right to release the entire cause of action. It does not belong to that class of cases where one of the joint obligees, promisees covenantees, may accept performance, and give an acquittance" (referring to *Baker v. Jewell*, 6 Mass. 460).

The settlement with one of two partners who are jointly liable for taking personal property, for one half of the property taken, will not prevent a recovery of the other half (*McCallis v. Hawes*, 38 Maine, 566).

¹ 22 Maine, 287.

‘one tenant in common discharges the cause of action, it must have a like effect. The plaintiff would avoid this result by showing that the mill logs, after they were cut, became the property of the plaintiff and of Chase; that one tenant in common of personal property can sell his own share only, and that the settlement and release of Chase was an attempt to sell the whole property; and that it could not therefore destroy the right of property in the plaintiff. These positions are correct so long as the common property exists unaffected by the illegal acts of others, and subject to the possession of the tenants in common. But when they have been deprived of the possession and enjoyment of it by a wrong-doer, their right to compensation for that injury is a joint one; and their remedy is by a joint action. And hence it is, that one of them may release and discharge both the joint right of action and the action itself.”

12. *Where possession of goods is obtained by fraud.*

§ 559. If a person obtain goods by a sale which is void in respect to himself, and transfer them to a *bona fide* purchaser without notice, the owner cannot maintain trespass for them.¹ When goods are unlawfully sold and delivered by an officer to a purchaser, the weight of authority is, that trespass cannot be maintained against the purchaser, unless the goods have come to his possession, in part at least, through his own fault.² * The reason of this is not that the

¹ Mowrey v. Walsh, 8 Cowen, 238; Parker v. Patrick, 5 Term R. 175; Ladd v. Blunt, 4 Mass. 402; Hunter v. Perry, 33 Maine, 159.

² Bacon's Abr. E, 2; Wilson v. Barker, 4 B. & Ad. 614; Fiero v. Betts, 2 Barb. 633; Justice v. Mendell, 14 B. Mon. 12.

* In Cooper *et al.* Assignees of Johns v. Chitty, 1 Burr. 32, it was considered an admitted point that the innocent vendee of goods wrongfully seized by the sheriff could have no title under the sale, but that he is liable to an action. And in Balme *et al.* v. Hutton *et al.* 9 Bing. 471 (23 Eng. C. L. 338), Tindal, C. J., said: “Servants of the bankrupt, judgment creditors who set the law in motion, vendees at the sheriff's sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt, would confessedly be held guilty of a wrongful taking.”

He who assumes to deal or intermeddle with personal property which is not his own, must see to it that he has a warrant therefor from some one who is authorized to give it. If he buys from, or consents to act by the direction of

owner's right to immediate possession is defective, but because the purchaser's taking is held not to be unlawful. Nor is this doctrine peculiarly applicable to the case of an illegal seizure by an officer. If one who is not an officer tortiously seize my goods, and afterward deliver them to another not a party to the original wrong, I cannot maintain trespass against that other, though I have a right to their present enjoyment, and may recapture them. But we have seen¹ that when possession has been acquired by trespass upon the first trespasser, the second taker is responsible to the owner in trespass.² It is laid down by an old authority that, "If I bail goods to a man, who gives or sells them to a stranger, and the stranger takes them without delivery, I shall have trespass; for, by the gift or sale, the property is not changed, but by the taking. But if the bailee delivers them to the stranger, I shall not have trespass."³ Again, it is said that if an infant give or sell his goods and deliver them with his own hands, the act is voidable only. But if he give or sell goods, and the donee or vendee take them by force of the gift or sale, the act is void, and the infant may bring trespass.⁴ And where a sheriff sold on execution goods belonging to a third person, and the purchaser did not immediately take them, it was held, that he acquired no possession as against the owner.⁵ Upon proof of the original tortious

another, he must see to it that in the responsibility of such other, he can find indemnity if his confidence is misplaced (*Sprights v. Hawley*, 39 N. Y. 441; *Anderson v. Nicholas*, 5 Bosw. 121, and cases cited).

At common law, the right of property in things sold is changed permanently by a sale in market overt; so that whoever buys goods and chattels in the open, public, legally constituted market, acquires an indefeasible title to the chattels so purchased, unless he buys with knowledge of an infirmity of title on the part of his vendor (2 Blk. Com. 449; *Crane v. London Dock Co.* 33 L. J. Q. B. 224). But one who buys goods by private contract, and not by public sale in market overt, acquires no better title than that possessed by his immediate vendor.

¹ *Ante*, § 425.

² *Acker v. Campbell*, 23 Wend. 372; *Talmadge v. Scudder*, 38 Penn. St. R. 517; *Marshall v. Davis*, 1 Wend. 109; *Nash v. Mosher*, 19 Wend. 431.

³ *Viner's Abr. Trespass*, M, Pl. 11, 12.

⁴ *Roof v. Stafford*, 7 Cowen, 179; *Fonda v. Van Horne*, 15 Wend. 631; *Ely v. Ehle*, 3 N. Y. 506.

⁵ *Austin v. Tilden*, 14 Vt. 325.

* In *Storm v. Livingston*, 6 Johns. 44, it was proved that a constable had

taking, it lies on the purchaser or bailee in order to protect himself from liability as a trespasser, to show that he came to the possession of the property for a lawful purpose, and in perfect good faith, by delivery from the wrong-doer. That

tortiously taken the plaintiff's horse and sold it at auction to the defendant, who kept it. It was held, that trover would not lie until demand and refusal, because the defendant came lawfully by the horse. The decision involved a denial that trespass would lie, for a taking which warrants an action of trespass is necessarily a conversion (see *Talmadge v. Scudder*, 38 Penn. St. R. 517). The following cases of trover are in point: In *Hurst v. Gwennap*, 2 Stark. 306, the assignees of a bankrupt sustained an action of trover without a previous demand for goods sold to the defendant by the bankrupt after a secret act of bankruptcy of which the defendant had no knowledge. Lord Ellenborough said: "The very act of taking the goods from one who had no right to dispose of them was in itself a conversion." And this was confirmed by the whole Court of King's Bench (s. *p. Soames v. Watts*, 1 Car. & P. 400; *Yates v. Carnsew*, 3 Car. & P. 101). In *Hyde v. Noble*, 13 New Hamp. 494, it was decided that the taking of chattels, claiming them under a sale by one who had no power to sell, was a conversion, and rendered the buyer liable to the owner in an action of trover without a previous demand. The following cases of replevin are equally in point: In *Parsons v. Webb*, 8 Greenl. 38, A. delivered his horse to B., to be sold for A.'s benefit. B. sold the horse to C., his creditor, in payment of his debt, and C. sold the horse to D. It was decided, that A. might maintain an action of replevin against D. without first demanding the horse. So, in *Galvin v. Bacon*, 2 Fairf. 28, where A., the bailee of a horse, sold him to B., and B. sold him to C., neither B. nor C. having any notice that the horse was not the property of A., the bailor maintained an action of replevin against C. without a previous demand. In all these cases, in which trover or replevin was held to be well brought, trespass might have been sustained, according to the well established law of actions.

In *Marshall v. Davis*, 1 Wend. 109, it was held, upon the authority of *Bacon's Abr. Trespass, C*, that replevin could not be maintained by a bailor against one who buys goods of a bailee who has no authority to sell them. *Savage, C. J.*, stated the ground of that decision to be, that there was, technically, no taking of the property to subject the defendant to the action of trespass, he having obtained possession by delivery from a person having a special property therein; and that the proper remedy was detinue, or trover. And see to the same effect *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 Hill, 618; *Nash v. Mosher*, 19 Wend. 431.

"Whoever," said *Weston, J.*, in *Galvin v. Bacon*, 2 Fairf. 30, "takes the property of another without his assent, express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful which is not justified or warranted by law; and of this character may be some acts which are not attended with any mortal turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner, and he could convey none to another. The purchaser is not liable to be charged criminally, because innocent of any intentional wrong, but the owner may avail himself against him of all civil remedies provided by law for the protection of property. If the bailee of property for a special purpose sells it without right, the purchaser does not thereby acquire a lawful title or possession. In the case before us, the defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civilliter* to the true owner for the taking as well as for the detention."

being proved, and that he was guilty of no fault, he would be protected against liability as a tortious taker of the property, although, even in that case, he would be answerable to the owner for the property after demand and refusal to deliver it, for he would not acquire any title to the property by his purchase.¹* But the owner of goods wrongfully taken after releasing the trespasser, cannot sue the vendee of the trespasser.²

§ 560. When a sale has been procured by fraud, the vendor still retains his legal right in the goods, unless, after discovering the fraud, he assent to and ratify the act of sale positively, or by such delay in reclaiming the goods as would authorize a jury to infer assent.³ This rule applies when the original taking of the goods was by permission of the owner, who was led to give the permission by such a fraudulent deceit on the part of the purchaser as avoids the sale if the seller chooses to avoid it.⁴ It has been held, that one who acquires possession of goods under a bill of sale given as security for a contract which at the time he intended not to fulfil, is as much a trespasser as though the bill of sale had never passed.⁵†

¹ Tallman v. Turck, 26 Barb. 167; Ely v. Ehle, 3 N. Y. 506.

² Woolsey v. Seely, Wright, 360.

³ Ash v. Putnam, 1 Hill, 302; Root v. French, 13 Wend. 570.

⁴ Tallman v. Turck, *supra*.

⁵ Butler v. Collins, 12 Cal. 457; M'Carty v. Vickery, 12 Johns. 348, *contra*.

* Symonds v. Hall, 37 Maine, 354, was an action of trespass *de bonis asportatis* for a quantity of hay. It appeared that the plaintiff had leased his farm to one Foster to be cultivated on shares; that, after the hay had been divided on the farm, it was taken by Hall, one of the defendants, on an execution against Foster, and that Morrill, the other defendant, bought the hay at sheriff's sale. The court, per Howard, J., in holding that the plaintiff was entitled to recover, said: "In taking and selling the hay of the plaintiff on an execution against Foster after the division had been effected, the defendant Hall was a trespasser; and Morrill, the other defendant, by purchasing that portion of the hay and removing it, with the assistance of the officer, became a joint trespasser; and both will be held responsible to the plaintiff for the damages accruing to him from that sale of his hay. The officer Hall is also accountable in like manner for taking, selling, and delivering to others the remaining portion of the plaintiff's hay, in which Morrill did not participate, and for which he is not accountable upon the pleadings and proof. The plaintiff is entitled to judgment against both defendants for the joint trespass, but not for the several trespass of Hall. Or he may discontinue as to Morrill, and take judgment against Hall for both trespasses."

† In M'Carty v. Vickery, *supra*, Vickery brought an action against M'Carty

§ 561. To render a sale of property void as to creditors, both the vendor and vendee must participate in the intent to delay the creditors of the vendor, at least to the extent of the vendee's having knowledge of such intent on the part of the vendor.¹ The old cases, before the statute of frauds,² have said, that if a man, after judgment, and to defraud execution, sell his goods for a valuable consideration, and the buyer knew of the judgment, the sale is void.³ But the modern doctrine is not merely that the purchaser must know of the judgment. That fact will not, of itself, defeat a *bona fide* sale, or make it fraudulent in law.* The rule is, that

in the court below for cutting and carrying away wood, to which the defendant pleaded the general issue. On the trial it was proved that one Fake purchased the wood of the plaintiff on credit, and that M'Carty went his security; that the wood was delivered to Fake, and M'Carty took it away although forbidden by the plaintiff, who charged that a fraud had been practiced on him, and that M'Carty was a party to the fraud. Fake and M'Carty were both supposed to be insolvent. The Supreme Court, in reversing the judgment, which was for the plaintiff, said: "Although it is pretty evident that the plaintiff below was deceived in the sale of his wood to Fake, yet there is no principle upon which an action of trespass can be sustained against the defendant. The wood had actually been delivered to Fake. The plaintiff was, therefore, divested of the possession which is necessary to the support of an action of trespass. Had not the plaintiff parted with the possession, the insolvency of the purchaser might have justified a refusal to deliver. But by the delivery, the property was changed, and trespass could not be maintained."

In an action of trespass for wrongfully seizing goods under execution, a plea is good which avers that the defendant, as agent of the plaintiffs in the execution, directed the marshal to levy on goods in the hands of another than the defendant, because they had been fraudulently sold to him by the defendant (*McNall v. Vehon*, 22 Ill. 499).

¹ *Leach v. Francis*, 41 Vt. 670; *Rowley v. Bigelow*, 12 Pick. 307.

² 29 Car. II, c. 3.

³ Under the 13 Eliz.

* In New York, in an action brought to recover the value of certain goods, which, it was alleged, had been forcibly and wrongfully taken from the plaintiff's possession, the question was whether the defendant, as sheriff, could rightfully seize the goods in question, and take them from the possession of the plaintiff, by virtue of attachments issued by a justice of the Supreme Court, in actions in that court against A. and B., on the ground that they, with the intent to hinder, delay and defraud their creditors, assigned the goods in question to C., who took them with the like intent, and transferred the same to the plaintiff, with notice of the fraud. It was held that the attachments authorized the sheriff to seize any property the defendants named in them had disposed of, in any manner, with intent to defraud their creditors; that the persons who procured the attachments were not to be deemed mere creditors at large of A. and B., after their attachments were served, but creditors having a specific lien upon the goods attached; and that the sheriff, as their bailee, had a like lien, and had a right to show that the plaintiff's title was fraudulent as against the attaching creditors (*Rinchey v. Stryker*, 28 N. Y. R. 45). The court said: "The fact that an attachment is issued, in a case like this, before the debt is conclusively established on which it is founded, and that it may subsequently be shown by

the purchaser, knowing of the judgment, must purchase, with the view and purpose to defeat the creditor's execu-

the defendant in the attachment, that there was no such debt, is not a sufficient reason for holding that the attaching creditor cannot show that the property attached is, in fact, the debtor's, when sued for it by a third person who claims it by a title which is fraudulent as against the attaching creditor. Such third person may prove that no such debt existed, until it is established by a judgment in the attachment suit. He may, therefore, defeat the attaching creditor on either of two grounds: 1st. That there was no debt to justify the issuing of the attachment; 2d. That he had a good title to the property in dispute when it was attached. Of course, the creditor or officer must first prove the existence of the debt for which the attachment was issued, when such debt has not been established by a judgment against the debtor. When that is done, the judgment proves it. It certainly is not an insuperable objection to permitting all of this to be done, simply because it authorizes the trial of two different issues in the same action. Indeed, two different issues must be tried in the action, if formed by the pleadings, though the creditor has previously recovered a judgment against his debtor, and is able by it to establish conclusively the existence of his debt. When the creditor has no such judgment, the party claiming that the property did not belong to the debtor when it was seized, has two chances of success. But when the creditor has obtained such a judgment, he has but one. In other words, the conclusiveness of the judgment, in effect, narrows the litigation down to a single issue. It has been said, that, although the creditor may be able to show, when sued for the property attached, that a debt was justly due him, for which the attachment was issued, and yet be defeated in his action for the recovery of the alleged debt. It may also be said, that he might be beaten in the first action, by failing to prove his alleged debt, and succeed in establishing it in the second. But this reasoning is no answer to the fact that the Code authorizes an attachment whenever the debtor has disposed of any of his property, with the intent to defraud his creditors. And it is right on principle, if not settled by authority, that creditors should be permitted to attach the property of their debtors, before conclusively establishing their debts by judgment, and thus prevent the consummation of fraudulent transactions which would deprive them of any successful remedy. And if, by the application of this rule, fraudulent purchasers should occasionally be beaten by persons who subsequently fail to establish their alleged debts in their actions against their debtors, the only result would be that some concoctors of frauds would be punished by the wrong persons. That is all. A like result would follow where the creditor recovers a judgment against his debtor, and takes property on execution, which the latter has fraudulently disposed of, if such judgment should subsequently be reversed, and the creditor finally beaten by his alleged debtor after having beaten the fraudulent purchaser of the property in the action brought by such purchaser for the property. But this has never been deemed a sufficient reason for preventing creditors from seizing the property of their debtors in the hands of fraudulent purchasers, until after the existence of their debts has been conclusively and finally established. The fact that the judgments against A. and B. were recovered after the issues in this action were joined, was no reason for their rejection. Their recovery was not a matter that the defendant was obliged to set up in his answer. They were but evidence, though conclusive, of the existence of the debts for which the attachments were issued—which evidence the defendant did not have, at the time he interposed his answer, to support it. If they had not been recovered, all the difference there would have been is, the defendant would have been obliged to prove the existence of the debts against A. and B. by other and different evidence, and the plaintiff could have given counter evidence on that question" (s. c. 31 N. Y. 140).

It has been held, in New York, that whenever one purchases property, with intent to defraud the creditors of the vendor, he takes it subject to the statute authorizing the property of his vendor to be seized upon an attachment issued

tion; and if he does it with that purpose, it is iniquitous and fraudulent, notwithstanding he may give a full price. The question of fraud depends upon the motive. The purchase must be *bona fide*, as well as upon good consideration. This was the rule, as declared by Lord Mansfield upon repeated occasions.*

in an action against his vendor; and if the property purchased be taken upon such attachment, he cannot, in an action against the sheriff, dispute the facts proved by the affidavits upon which the attachment was issued, but such facts are as conclusive against him in the action brought by him, as they would be in an action brought by the defendant (his vendor) against the sheriff. Such facts are as conclusive, in the action against the sheriff, to establish the relations between the plaintiff and defendant in the action in which the attachment is issued, as a judgment is in establishing the relation of creditor and debtor between the parties to the record. One who purchases property, with intent to defraud the creditors of his vendor, cannot complain that it is taken on attachment under a special statute requiring certain facts to be proved, and held until his vendor, if he sees fit, makes defense against the claim and defeats the action. The vendee has no right to appear in such action and make defense, nor can he compel his vendor to do so; and, in the absence of collusion or fraud, he will, as to the question of creditor and debtor, be bound by their acts, and the judgment rendered between them. If he is an honest purchaser, then he will recover, whatever may have been the relations between his vendor and the party suing him, and the question of *bona fides* in the purchase may be tried in his action against the sheriff (Hall v. Stryker, 27 N. Y. R. 596, per Marvin, J.) (In the foregoing case, Balcom, Selden and Rosekrans, JJ., were of the opinion, that whether or not the plaintiff in the attachment was a creditor, was an open question until he had obtained judgment: s. c. 29 Barb. 105; s. r. Bentley v. Goodwin, 15 Abb. Pr. R. 82).

In Falconer v. Freeman, 4 Sandf. Ch. R. 565, it was held, that a creditor who takes out a warrant of attachment, under the act of New York relative to absent and concealed debtors, thereby obtains a lien upon the property of the debtor proceeded against; and if the sheriff be prevented from levying the warrant on the debtor's property, by means of fraudulent claims or transfers, set up in respect of the same, the Court of Chancery would aid the creditor in enforcing the lien by injunction and otherwise, on the same principle that the court aids an execution creditor similarly obstructed.

* Boyd v. Brown, 17 Pick. 453, was an action of trespass against a deputy sheriff, for taking and carrying away the plaintiff's vessel. The defendant justified, under a writ of attachment, against one Averill. It appeared that the plaintiff had previously sold three-fourths of the vessel to Averill, and afterwards bought it back. It was proved that, before this purchase, Averill, being in embarrassed circumstances, had given a bill of sale of his share in the vessel to one Caldwell, without consideration, for the purpose of preventing its being attached by his creditors; and when the plaintiff agreed to purchase, he took a bill of sale from Caldwell, and not directly from Averill. It was held that, after the conveyance from Caldwell to the plaintiff, it was too late for the creditors of Averill to avoid the conveyance from him to Caldwell; that the payment of a full consideration to Averill confirmed the plaintiff's title, and purged the fraud in the original conveyance; that the plaintiff, therefore, stood on as good a footing as he would have stood on if he had purchased of Caldwell *bona fide* and without knowledge of the fraud. In the foregoing case, it was proved that the plaintiff, in payment for the schooner, agreed to indorse a certain sum on his note against Averill, but it was not then done. It was held that if the indorsement was not made until after the defendant's attachment, the delay would not

§ 562. The continued possession of goods by a vendor or debtor, who is in embarrassed circumstances, yields a presumption that the process or sale is rather colorable than real. For, in general, no reason can be given why possession should not be taken, except that he should be indulged with the disposition or use of the property to the injury of others. And proof of the payment of a full consideration, or of the justice of the debt for which property is taken, accompanied with the highest evidence of the honesty of the transaction, will not, in general, be sufficient to repel the legal effect of neglecting an actual removal of the property.* The means of proving a *bona fide* debt, or the payment of an adequate consideration, are so far within the power of the parties, where no debt or consideration actually exists; the difficulty of repelling that testimony by the creditor is so insurmount-

necessarily vitiate the sale, but that it was a circumstance for the jury to consider in connection with the other evidence, in determining whether or not the sale was fraudulent.

* The rule with regard to the necessity of a change of possession, in order to exempt property sold or assigned from attachment, prevailed generally in the United States for many years. But, after the alteration of the rule in England, it was gradually modified in this country, until it is now customary, in many and probably most of the States, to regard the want of change of possession before the attachment as only presumptive evidence of fraud (see *Rice v. Courtis*, 32 Vt. 460).

In Vermont, the rule requiring a change of possession to protect property from subsequent attachment, is peremptory and universal in its application to all property in the possession of the debtor at the time of the attachment or transfer. But a distinction has been made between property in the hands of the debtor, and property in the hands of a third person at the time of the attachment. Where the chattels sold or attached are in the hands of a third person, no visible change of possession is required, provided the vendee or creditor gives notice to such third person of his purchase or attachment. This decision was first made in *Barney v. Brown* (2 Vt. 374), and has been repeatedly reaffirmed (2 Vt. 555; 5 Vt. 231; 4 Vt. 464; 8 Vt. 344; 16 Vt. 580; 13 Vt. 418 and 558). In *Pierce v. Chipman* (8 Vt. 334), the ground of distinction was clearly stated by Collamer, J. Possession of either real or personal property by a third person is notice to the world that the title of the former possessor has been transferred; and purchasers or creditors dealing with the property are put upon inquiry, and are affected with knowledge of all the facts which, by reasonable investigation, they could ascertain. Hence, when the property is in the possession of a third person, there is an obligation upon a subsequent attaching creditor to inquire as to the ownership; and he is not allowed to rest content with mere observation (*Aldis, J., in Flanagan v. Wood*, 33 Vt. 332).

A sale of stock raised and kept on a farm, by a tenant, is void against his creditors, if it is still kept by him on the farm, notwithstanding the owner of the farm (who is not in the actual possession) agrees to keep the property for the vendee (*Rockwood v. Collamer*, 14 Vt. 141).

able, and the temptation, on the part of the owner of the property and his friends, to protect him from the pains of penury, is of such controlling influence, that, as a matter of policy, the law has removed the temptation to fraud, by making void, as against creditors, sales of personal property and seizures by legal process, unless accompanied by an actual removal of the property. If, when sold, or taken by legal process, it is actually removed from the possession of the vendor or debtor, its use or enjoyment by him is made impossible; and attempts to make feigned sales or seizures for that purpose are rendered abortive. This rule of municipal law is adopted, with more or less severity, in most places where the common law prevails, except in certain cases where its application would be impossible or injurious. In the familiar instance of the sale of a ship at sea, a delivery cannot be made at the time of sale; but is sufficient if made as soon as may be after the return of the vessel. And when property attached cannot be removed without great injury, as hides in a vat, or paper in a mill, at such a period in the process of manufacture that a removal would cause material damage or destruction, it is dispensed with.¹*

¹ *Mills v. Camp*, 14 Conn. 219, and cases cited; *ante*, § 447.

* Where a man buys a farm with personal property upon it, and takes his deed, puts it on record and enters upon the premises, though his family does not reside thereon, and assumes an exclusive control of the property, the vendor and his family not living on the farm, this is a sufficient change in the possession of the personal property to constitute a valid sale, although the vendor assisted the vendee to thresh some grain in the barn, a part of the property sold; the inference being that he assisted the vendee as his hired man or servant (*Wilson v. Hooper*, 12 Vt. 653).

A son, about leaving the county, with the intention to remain, sold and delivered to his mother a piano. After a few weeks, not succeeding abroad as he expected, he returned with his family, his mother residing with him, and the piano was kept at his house, and used by his wife with the permission of his mother. The piano having been sold by the sheriff, upon an execution against the son, it was held, in an action of trespass against the sheriff therefor, brought by the mother, that the plaintiff was entitled to recover (*Graham v. McCreary*, 40 Penn. St. R. 515; see *Brady v. Haines*, 6 Harris, 113; *Smith's Leading Cases*, 5th Am. ed. p. 73).

Beals v. Guernsey (8 Johns. 446) was an action of trespass against the sheriff to recover the value of seventy-three barrels of whisky. The whisky was purchased by the plaintiff from one Johnson, on the 18th of July. Johnson was then a prisoner within the liberties of the prison, having been surrendered by his bail, and notoriously a bankrupt. The whisky, when purchased by the plaintiff, was placed in the store of one Taylor; and the defendant sold it at Taylor's store

§ 563. Where personal property is sold or pledged by the owner to a creditor, who, after keeping it a short time, returns it to the original owner, the title to it, in the absence of explanation, will be deemed to be in the latter, and it will be liable to attachment at the suit of other creditors. *Houston v. Howard*¹ was an action of trespass for certain wagons. The plaintiff claimed to hold the wagons by virtue of an attachment against one Reed. The defendant laid claim to them under a prior purchase or pledge of them from Reed. The wagons were attached by the plaintiff while in Reed's actual possession. The only question was, whether the defendant had permitted the wagons to go back into Reed's possession in such a manner as to make them liable to attachment by

in November, under an execution issued against Johnson, on a judgment rendered against him two years previous. The plaintiff was present at the sale, notified the sheriff that the whisky was his property, and forbade his selling it. It appeared that the plaintiff and several others became bail for Johnson for the liberties of the jail; that the whisky was indorsed in part payment, on a bond given to the bail, for their indemnity; and that the plaintiff's note of hand, which he gave Johnson for the whisky, was deposited with one of the bail for his security. It was proved that the plaintiff called at the store of Taylor to receive the whisky, and that it was not delivered on account of Taylor's sickness. A principal point in the case was whether, under the circumstances, the sale of the whisky to the plaintiff was fraudulent. The fact of the non-delivery of the whisky seems to have been sufficiently accounted for; and there was nothing to show that the plaintiff knew of the judgment, or that he purchased the whisky with intent to defeat the execution. A verdict having been found for the plaintiff at the Circuit, the Supreme Court refused a new trial.

One may have the exclusive possession of personal property which is upon land occupied by him and another in common; and whether or not he has such exclusive possession, must ordinarily be a question of fact for the jury. In *Potter v. Mather* (24 Conn. 551), which was an action for taking a wagon, the plaintiff claimed title to the wagon under a purchase from his son; and the defendants claimed it under an attachment against the son, made subsequent to the purchase. The plaintiff and his son occupied in severalty adjoining tenements, to which there was a yard, occupied by them in common, so far as they had occasion to use it. The wagon, at the time of the purchase, and also at the time it was attached, was standing in this yard, though the plaintiff claimed to have taken immediate possession of it after the sale, and to have used it, and to have remained in the exclusive possession up to the time of the attachment. The defendants insisted, as matter of law, that there was no change of possession after the sale upon the facts admitted and claimed by the plaintiff, and requested the court to charge the jury that if, at the time of the attachment, the wagon was upon property in the joint possession of the plaintiff and his son, and in the same place where it was when the sale was made, and during the intermediate time had been left there, except when in actual use by the plaintiff, there was no change of possession, and the sale was, in point of law, fraudulent and void as against the defendants, who were attaching creditors. The court, however, submitted to the jury, as a question of fact, upon all the evidence, whether or not there had been a change of possession.

¹ 39 Vt. 54.

Reed's creditors. The wagons were taken from Reed's possession into the defendant's possession in March. The defendant allowed Reed to assume possession in the following June. About a week after this resumption, the plaintiff, finding the wagons in Reed's hands, attached them as Reed's property. It appeared that Reed delivered to the defendant in March, not only the wagons, but all his accounts, assets and business, and that the defendant took control of the whole, including Reed's store and trade. The object of this was to secure to the defendant certain debts, and to enable him to realize payment out of the avails of the assets. Reed still owned the property, subject to these liabilities. It was held that, when the defendant, in June, after having converted and applied upon the debts the most of the property, allowed the remainder, including the wagons, to return to the control and possession of Reed, the natural inference was, that the defendant was paid, his lien extinguished, and that the articles surrendered were Reed's absolutely; that this would have been the reasonable understanding, not only of strangers, but even of parties cognizant of the details of the original arrangement between Reed and the defendant; and that the plaintiff might attach the property as Reed's, and maintain trespass against the defendant for taking it after the attachment.

§ 564. Where goods are sold, which are in the custody of a third person, the buyer must give the person who has the care of the property notice of the sale, and such person must agree to keep the goods for the buyer, or they may be attached by the creditors of the seller.¹* A person having bought several sheep which were in the possession and keeping of B., requested B., to whom he gave notice of the pur-

¹ Whitney v. Lynde, 16 Vt. 579.

* Where property, at the time of the sale, is in the actual custody of some bailee or depositary for the vendor, all that is ever required in order to perfect the sale, as against creditors, is that the depositary shall be notified of the transfer, and consent to keep the property for the vendee. Cases might perhaps occur where less would suffice (Potter v. Washburn, 13 Vt. 558, per Redfield, J.).

chase, to act for him in selecting the sheep, and to take a delivery of and keep them for him, to which B. assented; and shortly afterward a selection was made under the purchase, and the sheep delivered by the vendor to B., who marked them with the initials of the vendee's name, and kept them for him in the same situation as before, until they were attached by a creditor of the vendor. It was held that such sale and delivery of possession were sufficient, and that the attaching creditor was liable to the vendee in an action of trespass.¹ In an action of trespass for taking and carrying away a sleigh, it appeared that the sleigh was in the shop of one Ayres, for the purpose of being painted, and that Willard, the owner of it, went to the shop with the plaintiff, and there sold him the sleigh, but no money was paid, and the sleigh was not then actually delivered to the plaintiff, though the painter, who was present, was directed to deliver the sleigh to the plaintiff, when finished, and agreed to do so. It was held that the action, which was brought against a sheriff for attaching the sleigh before it was finished, upon a writ against the original owner, could be maintained.² * When, however, the bailee of personal property is fully informed of the sale both by the vendor and vendee, he becomes keeper for the true owner by opera-

¹ Barney v. Brown, 2 Vt. 374.

² Willard v. Lull, 17 Vt. 412.

* In Willard v. Lull, *supra*, the court said: "The only question in this case is, whether the sleigh became the property of the present plaintiff, as there is no question made as to any actual fraud between the plaintiff and Willard. We think that the contract between the plaintiff and Willard was complete and perfected at the shop of Ayres; that the property then passed to the plaintiff, and that Willard was entitled to the price as soon as the painting was finished. All that was to be done thereafter was to be done by Ayres, and nothing by Willard. In relation to possession, the direction to Ayres and his agreement constituted him the agent for the plaintiff, and his possession was the plaintiff's possession; and according to the principle established in relation to the sale of property in possession of a third person, who is notified and agrees to keep the same for the vendee, this sleigh was not liable to be attached for the debts of Willard. When the defendant attached the sleigh, he still left it in the custody of Ayres, and his directions to Ayres could not, by a *quasi* attornment, change the character in which he held the sleigh, as bailee of the plaintiff, to a bailee of the defendant. The plaintiff actually had the custody and possession of the sleigh when it was forcibly taken from him by the defendant. It appears to us, therefore, that the plaintiff had a perfect title to the property in dispute, by sale, by delivery, and by actual possession."

tion of law, and his consent is immaterial; and if the vendor has no further use or beneficial interest in the property, and nothing transpires inconsistent with the sale, the property will be protected from the creditors of the vendor.¹

§ 565. After a sale of personal chattels has become perfected by such a visible, notorious, and continued change of possession, that creditors of the vendor may be presumed to have notice of it, the vendee may lend, or let, or employ the vendor to sell or perform any other service about the thing.² In case of the assignment of a permit to cut timber, and the cutting of the timber under it, there need not be a delivery to enable the assignee to maintain an action against an officer who seizes it under an attachment against the assignor, and the action may be maintained notwithstanding the assignor acted as the assignee's agent in manufacturing the timber, after it was severed from the soil, into boards.³ *

¹ *Pierce v. Chipman*, 8 Vt. 334.

² *Dewey v. Thrall*, 13 Vt. 281.

³ *Fiske v. Small*, 25 Maine, 453.

* The above case was an action of trespass against a sheriff for taking the plaintiffs' lumber under an attachment against one Hackett. The plaintiffs proved their right to the property under two permits to cut the timber, given by the owners of the land to Hackett, and by him assigned to the plaintiffs. It appeared that logs were cut under the permits, and that Hackett sawed them into boards on shares; and that while he was sawing them he spoke of them and treated them as his own, and did not then reveal the fact that he acted as the agent of the plaintiffs. A verdict having been found for the plaintiffs, the Supreme Court, in overruling exceptions to it, said: "There was no delivery of the logs to the plaintiffs after they were cut, and it is therefore contended by the defendant's counsel, that their right thereto was so imperfect as not to allow them to contest that acquired by virtue of an attachment of a creditor upon a precept against the assignors. The owners of the land make no complaint, and, indeed, it is not perceived that they could do so, as it does not appear that the cutting was not in the mode, and by the persons with whom they contracted. The individuals permitted had parted with all their rights before, and could not, after the cutting, acquire such an interest in the lumber as to make it attachable for their debts. It was competent for the plaintiffs to employ either or all of these as their agents to hold possession of the logs for them, after they were severed from the soil. The assignors were not rendered incapable of performing such a service by having been parties to the original contract. The case shows that the lumber was in possession of Hackett; and the jury have found, under proper instructions, that Hackett had this possession and control of the property as the plaintiffs' agent, and his possession must be regarded as theirs. Several cases have been cited to show that property sold and not delivered does not confer a title on the vendee, as against the attaching creditor of the vendor; also cases where the contract is for a chattel not in existence, which will not vest the property in the one contracting to have it made for him, without a delivery after its manufacture. This case is different from those referred to. The

§ 566. But when the purpose for which the possession of property is delivered to another is inconsistent with the continued ownership of him who parts with the possession, the transaction will be presumed fraudulent as against purchasers and creditors, and the title to have vested absolutely in the one to whom the property is delivered. Where, therefore, personal property was assigned for the benefit of creditors, and the assignees, after taking it into their custody, advertised it for sale, and, after keeping it fourteen days, sold it at public auction to a person who returned it to the original owner, it was held liable for the latter's debts.¹ So, where, in an action for the wrongful seizure and sale of certain liquors on an execution against H., it appeared that the liquors were delivered by the plaintiffs who were liquor merchants to H., a tavern keeper, to be retailed by him at his bar, and that the title was to remain in the plaintiffs until sold, it was held that the liquors were liable to be taken on an execution against H., and that the plaintiffs could not recover.² *

identity of the timber was not changed, in the conversion from trees to logs. If the plaintiffs had a claim to the former, they had also to the latter."

¹ *McGlynn v. Billings*, 16 Vt. 329; see also *Hall v. Parsons*, 15 Ib. 358; *Batchelder v. Carter*, 2 Ib. 168; *Emerson v. Hyde*, 8 Ib. 352.

² *Bonesteel v. Flack*, 41 Barb. 435; and see *Ludden v. Hazen*, 31 Ib. 650.

* Where a minor has purchased his time of his father, he is entitled to his own earnings as against the creditors of his father. *Chase v. Elkins*, 2 Vt. 290, was an action of trespass against a deputy sheriff for attaching a pair of cattle belonging to the plaintiff. The plaintiff bought the cattle of his father, with the money he earned during the last year of his minority, he having first paid his father the whole sum due him for his (the son's) time; and the son lent them to his father who was using them when they were attached. No reason was shown why the cattle did not belong to the plaintiff, provided a poor man in debt could sell or give his minor son his own earnings, or give him the right to work for his own benefit. There was no allegation of fraud, unless such a contract between father and son was necessarily fraudulent as against creditors. The court said: "If the father's right to the son's labor can be called property, he has the same right to dispose of it, in good faith, as he has to dispose of other property. He should have this right, that he may consult the genius, capacity, and inclination of the son, and direct the whole for the best interest of himself and son. If he deems it best for his son to serve as an apprentice to some trade, or enjoy the patronage of some gentleman of the bar, and become a lawyer, or the patronage of some clergyman, and become a preacher, no creditor has a right to interfere with this, and claim the son to labor, that he may attach his earnings. Nor, if he does labor, have they any right to his earnings until the same are vested in some attachable property. Possibly the father might re-assert his right over the son, and control his earnings during his minority. The son may

§ 567. Whether a conveyance or an attachment is fraudulent or not is necessarily a question of *fact* to be submitted to a jury; otherwise, an attaching creditor could not, under any circumstances, leave the property purchased or attached in the possession of the original owner for a moment after a reasonable time had elapsed for its removal, and no evidence would be admissible to prove the transaction *bona fide*.* *Koster v. Merritt*¹ was an action of trespass for taking a sloop. Hubbard and Dayton, of Greenwich, Connecticut, were the owners of the sloop, which they had run between Greenwich and New York, and they sold it in New York to the plaintiff, a resident of New York, for its full value, part of the consideration being a debt which they owed the plaintiff, and the residue the assumption by the plaintiff of certain debts due from Hubbard and Dayton. The plaintiff took formal possession of the sloop, but immediately engaged Hubbard, who had been acting as her captain, to remain in the same situation, notified the crew of the purchase, and employed them. There were other facts in the case from which an inference could be drawn that the possession was retained by the vendors. Soon after the sale the vessel pro-

so conduct that it would be his duty so to do. And the cattle being in the possession of the father and used by him, as stated in this case, might be proper evidence for the jury to weigh, if such a question were urged. But the case puts this at rest. For it states that the plaintiff bought the steers with his earnings, and lent them to his father."

In *Hunter v. Westbrook*, 2 C. & P. 578, the plaintiff had given to his son, when sixteen years of age, a watch and some other property. The watch got into the possession of the defendant, who detained it against the son and the father. The plaintiff brought trover for the watch. The court decided that he could not maintain the action, because his title and right of possession had been divested by a gift to the son.

A.'s goods were sold by the sheriff under execution, bought by B. and sold by him to A.'s wife. The property having passed into the possession of the vendee, and the vendor having received a considerable portion of the purchase money, it was held that he could not maintain trespass against the sheriff for again selling the goods as the property of A. (*Waldron v. Haupt*, 52 Penn. St. R. 408).

¹ 32 Conn. 246.

* It is believed that none of the cases go this length except *Edwards v. Harben*, 2 Term. R. 587, and *Hamilton v. Russell*, 1 Cranch, 97. In all other cases the question whether the sale was fraudulent or not has been submitted to the jury. See *Burrows v. Stoddard*, 3 Conn. 431. The New York Revised Statutes (5th ed. vol. 3, p. 225) provide that the question of fraudulent intent shall be deemed a question of fact and not of law.

ceeded to Greenwich, where it was attached by the defendant, who was a creditor of Hubbard and Dayton, as their property. Thereupon the plaintiff brought this action. The defendant contended that possession by the vendors made the sale in law fraudulent and void as to creditors. But the judge who presided at the trial received proof of the facts only as evidence of fraud, and a verdict having been found for the plaintiff, the Supreme Court refused to disturb it.* The declarations and acts of a debtor respecting property alleged by an attaching creditor thereof, or one representing him, to have been fraudulently conveyed to the party claiming it, made or done before the supposed sale, are admissible in evidence if such declarations and acts have a tendency to show that the sale was made with a fraudulent design. Such evidence becomes no less admissible when the declarations and acts are in the absence of the party to whom the sale is made. The one who alleges the fraudulent sale must establish two propositions: One that the vendor conveyed the property for the purpose of defrauding or delaying his creditors; and the other, that the vendee participated in the fraud. The former proposition being distinct from the other, may be proved by statements and conduct of the vendor unknown to the vendee. The presence of the vendor in court, when such evidence is offered, is no objection to the testi-

* In *Koster v. Merritt*, *supra*, the court, per Dutton, J., said: "This sale was made in New York, and we think the contract must be governed in its construction and effect by the law of that State. It is now well settled by the decisions of the courts of New York that such circumstances of the retention of the possession by the vendor as existed in this case, and such other circumstances as tended to show a secret trust, are only evidence of fraud, and do not authorize the court to pronounce the sale fraudulent *per se*. It has been strongly urged that the *lex loci contractus* does not apply to such a case as this; that that doctrine is only applicable where the construction or validity of a contract considered by itself is in question; but that the point made here is, whether proof of facts occurring after the contract is complete can be admitted, and what effect is to be given to such evidence; that this question is one which each court must determine for itself to regulate its own action, and that for this purpose the same rules should in all cases be adopted, without reference to the locality of the transaction. It must be acknowledged that the presentation of the question has much plausibility, but we think it ought not to prevail. The principle which lies at the foundation of the *lex loci* applies with full force to such a case as this."

mony, which is not to be excluded by the subsequent call of the vendor as a witness by the same party.¹ *

§ 568. A sale of goods may be void as to any legal remedy upon it, and valid as to the possession of the vendee. Where goods were sold on Sunday to be delivered afterward, and on a subsequent Sunday the vendor gave the vendee permission to take them away, which he did the Monday following, it was held that the vendee might hold the goods not only against the vendor, but also against the creditors of the vendor.² † It is generally said of such an illegal contract

¹ White v. Chadbourne, 41 Maine, 149.

² Smith v. Bean, 15 N. Hamp. 577.

* Pierce v. Hoffman, 24 Vt. 525, was an action of trespass for a wagon which the defendant had attached and sold as the property of one Butterfield, the plaintiff claiming that he had previously bought the wagon of Butterfield. The defendant introduced evidence tending to prove that the sale of the wagon by Butterfield to the plaintiff was fraudulent, and it was held that other fraudulent transactions between the parties about the same time of the one in question was admissible. By the court: "In cases of this kind there is a probable connection in a series of sales, nearly at the same time, the result of which is to strip a man of his available property, and enable him to leave the country. It would be impossible generally to show the object and intention of the parties without allowing everything to come into the case which might fairly be supposed to have a connection with the general design to be ultimately accomplished. A fraudulent transaction between the same parties, which had no connection with the particular failure, might not be competent evidence. But all which regarded the very failure and absconding (and it would seem the testimony objected to had such connection) should go before the jury. If this were not so, it would be in the power of parties, by subdividing such transactions, to altogether destroy the force of the evidence resulting from their general character."

† This was an action of trespass for taking a pair of oxen. It appeared that the cattle were sold to the plaintiff by one Boies on Sunday; that on a subsequent Sunday Boies agreed that the plaintiff might send and take them away, which the plaintiff did the next day; and that a few days afterward the defendant attached them as the property of Boies in the possession of the plaintiff. The court, in holding that the plaintiff was entitled to recover, said: "The contract of sale by Boies to the plaintiff was made on the Sabbath. The plaintiff took possession of the oxen on Monday. If Boies had delivered them on that day, the completion of the sale by the delivery being lawful, it would not have formed a legal objection to the sale that the negotiation respecting it, ending in an agreement to make it, took place at a time when secular labor was forbidden and unlawful. The contract would have been executory until perfected by the delivery, and the perfected contract of sale would have been lawful and binding. But the report shows no delivery of the oxen by Boies on Monday. The plaintiff took possession of them on that day, but it was by the direction or permission of Boies given on the previous day. All that was done by Boies was done on Sunday. If he sold the property then it was on that day. The contract of sale was made that day, and the plaintiff took possession of his purchase the next day. If Boies were now seeking to recover the purchase money, we must on these facts hold the sale to have been illegal, giving the vendor no right of action. * * * * * The plaintiff received the oxen with the assent of Boies

that it is void. If this were so, no property would pass by it; the vendor might reclaim the property at will, and being his property, it would be subject to attachment and levy by his creditors in the same manner as if the attempt to sell had never been made. But this is not what is intended by such phraseology. The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not assist the vendor to recover the price. The vendee has the possession of his own property with the assent of the vendor, and the law leaves the parties where it finds them.

upon a contract of sale, which in effect passed the property as between them, whether the plaintiff paid or not, and if he did not, whether Boies can recover the price of him or not, is immaterial. The plaintiff is entitled to hold the oxen against Boies, and may therefore hold them against the creditors of Boies unless the sale was fraudulent as to creditors. The fact that it was illegal, because against the policy and prohibitions of the law, does not show that it was fraudulent as against creditors, and there is nothing in the case to show actual fraud" (citing *Drury v. Defontaine*, 1 Taunt. 131; *Allen v. Deming*, 14 N. Hamp. 133, 137, 138, and cases there cited; *Lewis v. Welch*, 14 N. Hamp. 294, 298; *Fennell v. Ridler*, 5 Barn. & Cres. 406; *Clark v. Gibson*, 12 N. Hamp. 386.)

CHAPTER V.

REMEDY FOR THE WRONGFUL TAKING OR INJURY OF PERSONAL PROPERTY.

1. Ground of action.
2. Declaration.
3. Grounds of defense.
4. Plea.
5. Replication.
6. Evidence of possession.
7. Proof of taking.
8. Evidence as to value.
9. Proof of time.
10. Attendant circumstances.
11. Intention.
12. Presumptions.
13. Evidence of justification.
14. Evidence in mitigation of damages.
15. Objections to evidence, when to be made.
16. Damages in general.
17. Exemplary damages.

1. *Ground of action.*

§ 569. The owner of personal property which has been unlawfully seized and sold, may either disaffirm the act and sue for a trespass, or for a conversion of the property, or he may affirm the act and claim the benefit of the transaction.* But if he has once affirmed the act, he cannot afterward treat it as a wrong, nor can he affirm the act in part and avoid it in part.¹† Where machinery of a mortgagor was levied

¹ *Brewer v. Sparrow*, 7 B. & C. 310; *Lythgoe v. Vernon*, 5 H. & N. 180.

* In cases where either trespass or trover might be maintained, the injured party may, if he choose, waive both the trespass and the conversion, and recover for any damages he may have sustained, in a special action on the case (*Branscomb v. Bridges*, 1 B. & C. 145; *Phillips v. Bacon*, 9 East, 298; *Smith v. Goodwin*, 2 Nev. & Man. 114; *Gilson v. Fisk*, 8 N. Hamp. 404; *Christopher v. Covington*, 2 B. Mon. 357).

The question of waiver is one of fact, and not of law, depending upon the acts and intentions of the parties, and all the circumstances of each particular case upon which it is the province of the jury to pass (*Coffin v. Field*, 7 Cush. 355).

† If the plaintiff, in an action against an infant for injuring a hired horse, declares in case, he thereby affirms the contract of hiring, and the plea of infancy

upon in the mill of the mortgagee, and the mortgagee was in the mill part of the time during the sale, and waived all objections thereto, and certain nuts, wrenches, and screws belonging to the mortgagee were taken or lost by the bidders without the knowledge of the officer or his assistants, it was held, that the latter were not liable to the mortgagee therefor.¹ Simply receiving the benefit of property in its use by one who wrongfully took it, does not constitute a basis for an action of assumpsit by the owner. To enable him to bring such an action, the goods must have been converted into money or money's worth.² But while goods which have been wrongfully taken are in the custody of the defendant, the action may, by contract, be converted into an action for goods sold and delivered, the subsequent assent to treat the matter as resting in contract having relation back to the time the goods were taken, and in legal effect converting it into a sale of the goods at the request of the defendant.³ When, however, the proof fails as to the wrongful taking, the plaintiff cannot waive the tort at the close of the case and recover as upon a contract.⁴

§ 570. The plaintiff may make the wrongful entry of the defendant the gist of his action, or waive the wrongful entry and rely upon the taking and carrying away; and, in either case, the judgment may be pleaded and shown in evidence in bar of another action. In *Wadleigh v. Janvrin*,⁵ which was an action of trespass by the vendee of a farm against the vendor for carrying away from the premises, after the sale, a

will be a good defense, for the plaintiff cannot affirm the contract and at the same time, by alleging a tortious breach of it, deprive the defendant of his plea of infancy (*Campbell v. Stakes*, 2 Wend. 137).

¹ *Fullam v. Stearns*, 30 Vt. 443.

² *Jones v. Hoar*, 5 Pick. 285, and *post*; *Balch v. Patten*, 45 Maine, 41; *Glass Co. v. Wolcott*, 2 Allen, 227; *Smith v. Smith*, 43 N. Hamp. 536; *Gilmore v. Wilbur*, 12 Pick. 124; *Allen v. Ford*, 19 Ib. 217; *Mann v. Locke*, 11 N. Hamp. 246; *White v. Brooks*, 43 N. Hamp. 402; 1 Chit. Pl. 39, 40. But see *Hill v. Davis*, 3 N. Hamp. 384; *Cummins v. Noyes*, 10 Mass. 435.

³ *Stearns v. Dillingham*, 22 Vt. 624.

⁴ *Ransom v. Wetmore*, 39 Barb. 104.

⁵ *Wadleigh v. Janvrin*, 41 N. Hamp. 503; *Woods v. Banks*, 14 Ib. 101; *Lyford v. Putnam*, 35 Ib. 563; *Nelson v. Burt*, 15 Mass. 204; *Woodruff v. Halsey*, 8 Pick. 333; *Walker v. Sherman*, 20 Wend. 636; *Goodrich v. Jones*, 2 Hill, 142.

cider mill and other articles, it was contended by the defendant that, even if the property in question passed by the conveyance as part of the real estate or affixed thereto, the present action could not be maintained, but only trespass *quare clausum*. It was held, however, that when the defendant removed the cider mill and other articles from the farm they were, by his wrongful act, converted from chattels real, or fixtures, into chattels personal; that the title and ownership still remained in the plaintiff, and that for their subsequent appropriation the defendant was liable either in trespass or trover.

§ 571. If an infant wilfully injures personal property, trespass will lie against him therefor.¹ In an action for exploding a fire cracker under the horse of the plaintiff while passing through one of the public streets of a city on the Fourth of July, whereby the horse became frightened and fell down and died, it was held, that the infancy of the defendant was no protection. There was a controversy at the trial in the court below, whether or not the defendant was requested by the plaintiff not to explode the cracker. It was held, that this was not important in any view, although if the act was done after the defendant was requested to desist, it would show that the boy was reckless of the consequences.²*

¹ Campbell v. Stakes, 2 Wend. 137; *ante*, § 40.

² Conklin v. Thompson, 29 Barb. 218.

* The real question at issue in the above case was as to the cause of the death of the horse. The proof showed that the defendant threw the lighted cracker under the horse, where it exploded; that the horse appeared much frightened, sheared toward the sidewalk, reeled, and fell, and almost immediately expired. He was proved to have been, up to that time, in good health; was 18 years old, and had traveled twenty-two miles in five hours that morning. Some of the witnesses thought he died from apoplexy caused by over-driving, and some from fright. It being purely a question of fact, and the jury having found a verdict for the plaintiff, the court refused to disturb it.

It was held, in North Carolina, that trespass would not lie against a bailee unless the property had been destroyed by him (*Setzar v. Butler*, 5 Ired. 212). Where a servant, in the ordinary performance of his master's duty, but without his knowledge, uses the property of another and injures it, trespass is not the proper remedy against the master (*Gordon v. Rolt*, 7 D. & L. 87).

In New York, in an action for the wilful and wrongful injury of the plaintiff's property, and for wrongfully and wilfully depriving him of the use of

2. *Declaration.*

§ 572. The declaration must specify what goods were taken. A general averment that there were taken goods, to wit, one hundred articles of household furniture and one hundred articles of wearing apparel, without describing their nature or quality, will be insufficient.¹* But in an action for taking and carrying away several descriptions of poultry, the plaintiff need not allege how many there were of each description, the collective value of the whole being stated.² So, likewise, a declaration in trespass, for taking and carrying away mahogany tables, chairs and a bureau, without stating the number of tables and chairs, was held good after verdict: as "the jury must have had evidence of the number of the several articles taken; at least they would have found damages only for so many as were proved."³ The omission to specify the value of the articles carried away, would be a defect of form, which could only be taken advantage of by special demurrer—the defect being cured by pleading in chief, and by the verdict.⁴†

certain parts of such property, the defendant may be arrested and imprisoned upon execution (*Niver v. Niver*, 43 Barb. 411). In *Tracy v. Leland*, 2 Sandf. 729, disapproving *Starr v. Kent*, 2 Code R. 30, which was an action against a female for the wrongful taking of a piano, the plaintiff rested his right to an arrest on the sole ground that a wrongful concealment and withholding of the property is in itself a wilful injury to it. The court, in discharging the defendant from arrest, remarked that the two things were in their nature entirely different. The ground taken by *Mason, J.*, in *Tracy v. Leland*, 2 Sandf. S. C. 729, that the wilful injury to property for which the arrest of a female is allowed by the code, is a physical injury, such as breaking it to pieces, or otherwise damaging it intentionally, whereby its value is lessened or destroyed, was disapproved in *Solomon v. Waas*, 2 Hilton, 179, per *Daly, J.*

¹ *Holmes v. Hodgson*, 8 Moore, 379.

² *Donaghe v. Rondeboush*, 4 Munf. 251.

³ *Richardson v. Eastman*, 12 Mass. 505.

⁴ *Bertie v. Pickering*, 4 Burr. 2455; *Strode v. Hunt*, 2 Lev. 230; *Usher v. Bushell*, 1 Sid. 39; *Newcomb v. Ramer*, 2 Johns. 421 *note*; *Baker v. Baker*, 13 Metc. 125.

* An averment of "furniture, &c.," will not include coffee, sugar and apples (*Whitmore v. Bowman*, 4 Greene (Iowa), 148). But under a declaration in trespass, for taking the plaintiff's goods, chattels and effects, it was held, that he might recover the value of fixtures (*Pitt v. Shew*, 4 B. & A. 206).

Where the taking of personal property is one single and indivisible act, the plaintiff will not be permitted to split up his claim for damages into separate suits for each article seized (*Farrington v. Payne*, 15 Johns. 432).

† In *Higgins v. Hayward*, 5 Vt. 73, which was an action of trespass for taking

§ 573. The plaintiff need not anticipate in his declaration the defense; as that on a certain day the defendant, being an officer, and having certain writs against A., B. or C., by virtue thereof took the plaintiff's goods;¹ or, that the plaintiff is married and has a family, and that the property taken is exempt from execution.²

§ 574. If the declaration shows a good cause of action, it will be sufficient, notwithstanding it contains other allegations which are unnecessary or false.* Accordingly, where the

a chaise and harness, it was insisted that the omission of the words "*with force and arms*," in the declaration, was fatal. The court, in holding that such an omission did not vitiate, unless met by a special demurrer, said: "There exists in this State neither of the reasons which ever existed in England, for making this averment in a civil action. When first introduced in England, the civil action was also a criminal process; and if the plaintiff recovered damages, a fine was assessed to the king. Hence the *vi et armis* and *contra pacem* were apt expressions in reference to one part of the judgment that must be rendered in the action, if the plaintiff recovered at all. When the statute, 5 Wm. & Mary, c. 12, abolished this fine, it created a substitute by requiring the plaintiff, on signing judgment, to pay a fixed sum, which he recovered back in his judgment. And the *vi et armis* seems as necessary to secure this substitute as it did before to warrant the fine. But by the statute, 4 & 5 Ann. c. 16, the omission of *vi et armis* and *contra pacem* is aided, except on special demurrer (Gould's Pl. pp. 188, 189). In this State there never has been a fine imposed upon the defendant, nor any duty collected of the plaintiff, in an action of trespass, any more than in an action of assumpsit; and there never has been any reason for inserting those expressions in our writs of trespass, except preserving a reverence for ancient forms; and when the reason for a law ceases, the law itself ceases, in many cases, at least. Moreover, the practice under some very ancient English statutes is so interwoven with the common law, it has come down as a part of the common law, and has become a part of the common law in this State. On one or more of these grounds, the insertion of the *vi et armis*, in civil actions of trespass, has long since lost its seeming importance, unless the omission is met by a special demurrer."

¹ Dane v. Gilmore, 49 Maine, 173; Davis v. Cooper, 6 Miss. 148.

² Stevens v. Somerindyke, 4 E. D. Smith, 418.

* A count for taking away goods may be united with a count for trespass to land (Wilson v. Johnson, 1 Iowa, 147).

The statute of Connecticut, which authorizes the joinder of trespass and trover, does not alter the character of either form of action when joined. In Belden v. Grannis, 27 Conn. 511, the declaration contained two counts. The first was in trover, for the conversion of certain goods belonging to the plaintiff, and the second was in trespass, for the taking and carrying away of the same articles. By the common law, these counts could not be joined; and the question was, whether the joinder was proper under the statute which provided that "one or more counts in trespass on the case, founded in tort, may be joined with one or more counts in trespass in the same declaration, when all of such counts are for the same cause of action." The goods in question were used by the plaintiff in carrying on the business of a milliner. The second count set forth, with particularity, the circumstances attending the trespass upon the goods, and then proceeded to describe the consequences resulting to the plaintiff from the wrongful act of the defendants in taking and carrying away the property,

plaintiff admitted in his pleading, that the trespasser had returned the property, with the qualification that the property was returned in a damaged state; it was held, that as if the same facts had appeared in evidence, without having been set out in the complaint, the return would have gone in mitigation of damages; the circumstance that the plaintiff had unnecessarily inserted a statement of the mitigating fact in his complaint, was of no legal consequence.¹ Again, the plaintiff having averred that the defendant, without reasonable or probable cause, instituted a suit against the plaintiff in a court which had no jurisdiction, and attached and kept the plaintiff's property for twenty days, the defendant contended that the declaration was for a malicious prosecution, and could not be maintained as an action of trespass. But it was held that the seizure of the property was a trespass for which the plaintiff was entitled to recover as a substantive ground of damages.² So, likewise, where, in an action of trespass for levying upon the property of A. under an execution against B., it appears that the plaintiff set up a claim to other and distinct parcels of the personal property which once belonged to the plaintiff in the execution, such claim, though unfounded and fraudulent, will not deprive the plaintiff of his right of action, or diminish the amount which he is entitled

as follows: "That the defendants, by forcibly taking possession of the store of the plaintiff, and by seizing said goods, and by putting men in said store, and entering therein themselves, did completely cause the business of the plaintiff to cease, and did prevent said workmen in the employ of the plaintiff from continuing their said work, and did hinder, obstruct and stop the business of the plaintiff for a long space of time, to wit, for the space of three days, and did cause the plaintiff great expense in traveling to, and being detained in, the city of New York, for the purpose of purchasing other goods to supply the place of those taken." The defendant insisted that the second count set forth not only the cause of action described in the first count, but likewise a trespass to the real estate of the plaintiff; and also a cause of action in case, for the injuries resulting to her in the loss of business, and in being subjected to trouble and expense in procuring other goods. The court, however, held that it was clear that the sole ground of complaint made by the plaintiff was the trespass committed upon the goods; that the matters set forth, which the defendant claimed constituted separate causes of action, were alleged merely to aggravate the damages resulting from the trespass; and that consequently there was no misjoinder of counts.

¹ *Kerr v. Mount*, 28 N. Y. R. 659.

² *Whiting v. Johnson*, 6 Gray, 246.

to recover for the property actually belonging to him, and which was illegally taken by the defendant.¹

§ 575. There must be an averment of the plaintiff's title to the property.² In *Carlisle v. Weston*,³ the declaration did not allege that the plaintiff owned the goods, or that he had the possession or right to their possession. A verdict having been found for him, on a motion in arrest of judgment, Shaw, C. J., said: "The declaration is fatally defective in not stating the plaintiff's title. The court have no means of knowing, from the minutes of the judge who tried the case, or otherwise, that the plaintiff's property in the goods was proved; and not being stated in the declaration, it is not to be presumed." And where the declaration only averred an assignment of the property to the plaintiff by the original owner, without setting up an assignment of the claim for damages for the taking, it was held that there could be no recovery.⁴

§ 576. But if the allegation, though technically deficient, be substantially an averment of property in the plaintiff, the declaration will be sustained. In *Stanley v. Gaylord*,⁵ which was an action of trespass brought by an administrator, the declaration averred the taking and driving away of a certain cow of the plaintiff's intestate. The objection was that there was not a sufficient allegation of property in the plaintiff; that it was not the case of a title defectively stated and which was cured by the verdict, but one in which no title was set forth. The ground of objection was that there could be no property in a deceased person, and that here the allegation was of the taking and driving of a "cow of the plaintiff's intestate." It was held that the averment, though informal, would be presumed upon a reasonable construction to be of a taking and carrying away in the lifetime of the

¹ *Phillips v. Hall*, 8 Wend. 610.

² *Hite v. Long*, 6 Rand. 457.

³ 1 Metc. 26.

⁴ *Sherman v. Elder*, 1 Hilton, 178; and see *McKee v. Judd*, 2 Kernan, 622.

⁵ 10 Metc. 82.

intestate, as the property was alleged to be in her and not in the plaintiff, which averment was sustained by the evidence. But the court intimated a doubt whether an action of trespass, on the facts as stated, could be maintained by the administrator. If the declaration allege that the goods are the property of the plaintiff, it need not aver that they were in his possession at the time of the taking.¹ And where the plaintiff sets up title by purchase under a dormant execution, he need not aver the time or place of purchase, nor directions given to suspend proceedings under the execution, nor that such directions were given to defraud; neither is it necessary to state the consideration paid.² *

§ 577. A count in trespass for injury to personal property cannot be joined to a count for injuring the plaintiff's health. In *Boerum v. Taylor*,³ the first count was for injuring a certain jug, and a quantity of liquor contained in the same, by putting certain noxious substances therein, by means of which the jug was lessened in value, and the liquor spoiled. The second count was in case, for injuring the health of the plaintiff. After setting forth that the plaintiff was possessed of a certain other jug, and a certain other quantity of liquor, the pleader went on to state, in substance, that the defendant then and there, wickedly and maliciously intending to administer the liquor to the plaintiff, and cause him to drink thereof, did put the noxious substances therein described into the said liquor, which rendered the same unwholesome, and the plaintiff, being ignorant thereof, drank of the same, to the great injury of his health. The burden of complaint in the second count was the injury to the health of the plaintiff, and the mixing of the noxious substances with the liquor was spoken of merely as the means by which

¹ *Donaghe v. Roudeboush*, 4 Munf. 251.

² *Hickok v. Coates*, 2 Wend. 419.

³ 19 Conn. 123.

* In an action of trespass for driving against the plaintiff's cart, it is an immaterial allegation who was riding in it (*Howard v. Peete*, 2 Chit. 315), or to whom the cart belonged at the time of the accident (*Hopper v. Reeve*, 1 Moore, 407; 7 Taunt. 698).

the defendant inflicted the injury. It was held that there was clearly a misjoinder of counts.

§ 578. Where the injury is alleged to have been committed on divers days and times within a specified period as well as on a day particularly named, constituting several acts distinct in time, but identical in kind, the plaintiff will be entitled to recover for successive trespasses.* *Folger v. Fields*¹ was an action of trespass for taking and driving away sheep. It had been previously admitted that the plaintiff was entitled to recover, and, according to agreement, the defendants had been defaulted and an assessor appointed to assess the damages. Upon the report of the assessor now made, the question was as to the amount for which judgment should be entered. It appeared that the defendants were joint trespassers in taking and driving away certain sheep belonging to the plaintiff, on the 15th day of May, and also in taking, driving away, and impounding certain other sheep of his on the 16th day of the same month; and that some, but not all, of the defendants were joint trespassers in taking and driving away certain other of the plaintiff's sheep on various other days, during the time specified in the declaration. It was stipulated by the parties that to avoid another suit, the plaintiff might offer to the assessor "evidence of the improper and injurious treatment of the sheep after they were impounded," and that he should assess such damages therefor as he should consider to be proved. The assessor reported what sum the plaintiff ought to recover upon the assumption that the defendants were jointly liable for taking away and impounding the whole number of sheep mentioned. The defendants insisted that damages could be assessed against them, under the plaintiff's declaration, for only one single act of taking; and that, by force of the stipulation contained in the agreed statement of facts,

¹ 12 Cush. 93.

* A levy, taking away, and sale of property, although done on different days, constitute a single trespass, and the owner cannot be put to his election as to for which he will bring his action (*Browning v. Skillman*, 4 Zab. 351).

their liability was limited to the taking and treatment of those sheep only which were actually impounded. It was held that neither of these objections was tenable.*

§ 579. The allowance or refusal by the court of an amendment of the declaration will depend upon the fact whether or not the plaintiff proposes to introduce any new substantive cause of action; that is, a new and independent demand not originally claimed; or whether it sets out in a more orderly, intelligible, and formal manner, claims substantially made, but informally stated in the declaration as first framed. In the latter case it is admissible; in the former, not. The object of amendment is to put into legal and technical form that which was informally stated; and the only limit is, that under the pretence of amendment, new

* In the above case, the first objection depended upon the erroneous assumption that one act only could be proved, although the injury complained of was alleged to have been committed on divers days and times within a specified period, as well as on a day particularly named. The court said: "If there were any doubts whether, according to the more rigid rules of pleading which formerly prevailed, such a mode of declaring would be sufficient to enable a party to recover for successive and repeated trespasses, there would seem to be no occasion for any now. It is a simple, but comprehensive and intelligible statement of several acts, distinct in time, but identical in kind, all constituting together the plaintiff's cause of complaint. It can subject the defendant to no possible disadvantage, since he may always, if he really believes it material to his defense, guard himself against surprise, and ascertain with exactness the charges made against him by a bill of particulars which is now uniformly ordered in all similar cases."

With reference to the other objection, the object and effect of the stipulation was to enlarge and increase, rather than to restrain and diminish, the liability of the defendants. It was, therefore, manifest that the judgment ought to embrace, in addition to the damages for which the defendants were otherwise legally liable, a compensation for those injuries for which, by their express agreement, they made themselves responsible.

In the same case, the plaintiff contended that, by the default of the defendants, taken in connection with their agreement concerning the assessment of damages, the defendants must be held to have admitted that they took and impounded three hundred sheep, being the whole number alleged to have been carried away; and that he was therefore entitled, without further proof of loss, to recover compensation for the injury done to such as he regained, and for the value of so many more as would make with those regained three hundred in the whole. But this would give to the agreement a construction not intended by the parties. Except in relation to the manner in which compensation should be made for the improper and injurious treatment of the sheep while confined in the pound—which, without some specific provision, the assessor could not properly have included in his assessment—the agreement left him, in all other respects, to investigate and dispose of the subject of damages strictly according to law.

and distinct substantive causes of action shall not be introduced.*

3. *Grounds of defense.*

§ 580. The question how far a person can defend an otherwise indefensible act, by showing criminal or unlawful acts on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result generally reached is, that no man can set up a

* In *Bishop v. Baker*, 19 Pick. 517, the question was whether the judge before whom the action was tried decided correctly, in permitting the plaintiff to amend by adding a distinct count in trespass for taking and carrying away the plaintiff's goods, when the only count originally was for breaking the plaintiff's close and carrying away the goods. It was held that he did. Shaw, C. J., said: "By a long course of practice, it is settled that, under the genus 'trespass,' the several species of *quare clausum* and *de bonis asportatis* may well be joined, and that, if it were now decided otherwise, a vast number of judgments would be held erroneous. If, therefore, these counts had been originally joined, there could have been no objection."

In an action brought before a justice of the peace for taking away the plaintiff's cow, the defendant pleaded specially that he was possessed of certain land, and that the cow was doing damage thereon, and he impounded her; and the plaintiff replied that the defendant injured the cow, and, after a trial on that issue, the case was carried by appeal to the Court of Common Pleas. In that court the plaintiff obtained leave to amend, putting in issue the title to the close; and it was held that the allowance of the amendment was error (*Kelley v. Taylor*, 17 Pick. 218). By the court: "We think it ought not to have been allowed. It changed the character of the cause. The action, as it went up to the Common Pleas, on the appeal from the justice of the peace, presented the issue of an injury to the plaintiff's cow, but the amendment put in issue the plaintiff's title to real estate. Now, though, if the action had been commenced in the Court of Common Pleas, the amendment would have been allowable; yet, acting as an appellate court, it could not try an issue which might not have been tried before the justice. If the judgment of the justice had been on the same question as that of the Common Pleas, it would have shown that he had no jurisdiction. Further, where the action is carried up, pursuant to the statute, upon a plea of title to real estate, the parties have a right to appeal from the judgment of the Common Pleas to the Supreme Court. But the effect of sustaining the amendment, would be to withdraw the action from the justice by appeal, and have a trial on the question of title in the Common Pleas, and then no appeal to the Supreme Court would be allowable."

Exceptions will not lie to the refusal of a judge to allow an amendment, unless the bill of exceptions shows that he ruled, as matter of law, that the proposed amendment was one which could not be allowed. In *Gilman v. Emery*, 54 Maine, 460, which was an action of trespass for untying the plaintiff's horse, which was hitched to one of the defendant's shade trees, and fastening him to a hitching post, it appeared that the horse afterward broke loose from the post and ran away, and broke the wagon. The plaintiff having simply charged the defendant with taking and carrying away the horse and buggy, he moved, in the court below, to amend the declaration by inserting a new count charging the defendant with negligence in not hitching the horse securely. Leave not being granted, and the plaintiff having excepted, it was held that the exceptions could not be maintained.

public or private wrong, committed by another, as an excuse for a wilful, or unnecessary, or even negligent injury to him or his property.* It has been held, for instance, that purchase and payment made for liquors sold without license, together with the possession of them, are sufficient evidence of title, and a sufficient possession to enable the purchaser to maintain an action of trespass for taking them against a mere wrong-doer. No person has a right to dispossess another of such property by force, and if done without right, the person doing it must be answerable for its value as for other property. In an action of trespass for seizing certain liquors under a warrant, for which a writ of restitution had issued, the defendant offered to prove that, at the time of the seizure, and for a considerable time previous, the liquors were kept for sale by the plaintiff, he not being licensed to sell, and that he had been in the habit of selling said liquors in violation of law, but the presiding judge ruled that such testimony was not admissible. It was, however, held by the Supreme Court, that, as the value of the liquors must depend upon their *status* at the time of seizure, the evidence should have been received.¹ *Fuller v. Bean*² was an action of trespass against a deputy sheriff for seizing and taking away, by virtue of an attachment, certain liquors, in an action on a note brought by one Felton against one Fuller. It appeared that the liquors originally belonged to Fuller, who was selling them without license, and that becoming embarrassed, and owing the plaintiff, who was his brother, a debt exceeding the value of the liquors, he sold them to the plaintiff who immediately took possession and continued the sale of them without license. The note to Felton was given

¹ *Lord v. Chadbourne*, 42 Maine, 429.

² 10 Fost. 181.

* "This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases. It may be regarded as among those condensed maxims or statements of the common law, which, by their simplicity and brevity, and more than all, by their flexibility and almost universality, give to that system its wonderful adaptedness to the varying circumstances of particular cases as they arise, and to the changing condition of society and its new combinations and discoveries" (*Kent, J., in Hamilton v. Godding, infra*).

for liquors sold without license, by Felton to Fuller. The defendant claimed that, as the plaintiff had no license, and as he bought the liquors of his brother, for the purpose of selling them in violation of law, and did actually so sell them, he could not maintain the action; and, it having been so held at the trial, and a verdict found for the defendant, the Supreme Court set the verdict aside. In *Hamilton v. Goding*¹ the defendant, who was sheriff of the county, took and carried away, by his deputy, certain liquors belonging to the plaintiff. Although it was done under a writ against a third party, yet the defendant set up no defense on that ground, but, at the trial, abandoned all attempt to justify the taking under legal process. This left the defendant simply claiming that he or any other private citizen might lawfully do what he had done, because the articles taken were not property protected by law. The case presented the naked question whether intoxicating liquors owned and possessed by an individual, he intending to sell them illegally at some time thereafter, were, by this intention, which remained unexecuted, so entirely put out of the protection of the law, that any other person might at his will and pleasure carry away or destroy them; and it was held that they were not thus outlawed, either in consequence of their nature or by reason of any statute.* In *Ewings v. Walker*,² and in *Ar-*

¹ 55 Maine, 419.

² 9 Gray, 95.

* In the above case the court, in the course of a very elaborate opinion, said: "The common law does not arm and send forth single knights errant to vindicate its authority or avenge its wrongs, by inflicting punishment on supposed offenders according to the individual opinion and judgment of the avenger. Private action is, as a general rule, confined to private wrongs, and then only to be used when it becomes necessary to prevent or remove imminent and present obstructions to the exercise of private right. Many recent English cases are found which illustrate and adopt these views. It is held that it is not enough for a defendant to show an illegal act or intent on the part of the plaintiff, even if it constitutes a public nuisance. Want of care in driving, for instance, on the highway, cannot be excused by proving that plaintiff's animal, which was injured, was illegally there, or that the plaintiff was driving on the wrong side of the way contrary to the statute. The rule clearly to be deduced from these cases is, that the fact of the existence of a nuisance created by one party, or any illegal doing on his part, will not give a right of action, or be regarded as a defense where there has been a want of due care to avoid injury, and where the other party has voluntarily, and with no other excuse, injured or destroyed, or converted the property" (citing *Davies v. Mann*, 10 M. & W. 546; *Bridge v.*

thur v. Flanders,¹ where liquors had been seized by an officer acting under a regular warrant, the officer failing to show a legal right to take and hold part of the liquors seized, undertook to defend as to such part, by showing that all the liquors taken were held by the owner with intent to sell them in violation of law, and, therefore, that no action could be maintained for their value. The court overruled the point made, and held that the officer could not thus protect himself. These decisions were made under a law of Massachusetts which declared that no action should be maintained against any officer for seizing, detaining or destroying liquor, or the vessels in which it was kept, unless such liquor and vessels were legally kept by the owner. It was held that the statute did not, in its terms, protect the officers in the foregoing cases; and further, that if the statute had so undertaken to leave the owner remediless for injury to property, and with no right to be heard, the court would not hesitate to say that it was a clear violation of the bill of rights.*

§ 581. An action for the taking and carrying away of personal property under an attachment against a third person, will not be barred by a recovery in a suit brought by the same plaintiff for the same property commenced before the actual removal of the property.²† A recovery in replevin,

G. Junction R. R. Co. 3 M. & W. 244; Mayor of Colchester v. Brooke, 7 Q. B. 339; Bateman v. Bluck, 18 Ad. & El. N. S. 870; Dimes v. Petley, 15 Q. B. 276).

¹ 10 Gray, 107.

² Clark v. Harrington, 4 Vt. 69.

* It has been held that, at common law, it is not lawful for any and all persons to abate a common nuisance, merely because it is a common nuisance, although the rule has sometimes been stated in terms so general as to give some countenance to this supposition; and further, that the power has not been given to individuals, without process of law, to vindicate public right; but that the only power thus given to the private citizen, is to remove or abate a common nuisance when his individual right to act is obstructed or prevented by such nuisance. It has been also held that spirituous liquors are not of themselves a common nuisance, and if a nuisance at all, are made such by the statute which provides a mode for their destruction; that when a statute declares that to be a common nuisance which was not one before, and specifies and directs the mode of abating it, that is the only mode which can be pursued, and that it is not lawful for any private person to destroy the property by way of abatement of a common nuisance (Hamilton v. Goding, *supra*).

† In Clark v. Harrington, *supra*, the defendant attached the property in question on the 15th of April, but did not remove it. The plaintiff brought her

however, with a return of the goods, is a bar to an action of trespass for the same goods, although the damages awarded in the replevin suit have not been paid.¹ So, likewise, where a judgment in replevin is obtained against one of two joint wrong-doers for a part of the property taken, it will be a bar to an action afterward brought against both, for the same trespass, unless it be shown that the defendants destroyed, concealed, or sold a portion of the property so that it could not be replevied.^{2*} But a recovery in replevin against the

action for it on the 17th of April, the court to be held on the 27th of the same month. After the commencement of the action and before the day of trial, the defendant carried away the property. The plaintiff failed in the first action because it was brought before there was any actual carrying away of the property; and for this carrying away, the present action was brought. The court said:—"The defense set up in this case is so technical, and savors so little of equity, that it ought not to prevail until made out in the most conclusive manner. And the act of carrying away of the property now complained of, may be viewed as distinct from the first attachment. Suppose the defendants had let the property remain as it was till after the trial in the plaintiff's first suit, and the plaintiff failed to recover for want of proof that the defendants had intermeddled to her injury, and when that trial was over, the defendants carried off the property, could it be suspected that the plaintiff was left without remedy for this last taking? Or if the plaintiff had recovered nominal damages for the first taking, and that only because the property yet remained in the possession, and under the control of the plaintiff, could the defendants, after that, carry away the property, and the plaintiff be left without remedy? The actual carrying away, must be literally a continuance of the first taking, or so unjust consequences must not follow."

¹ Karr v. Barstow, 24 Ill. 580.

² Bennett v. Hood, 1 Allen, 47.

* In Bennett v. Hood *et al. supra*, it appeared that the two defendants by a single tortious act, carried away certain daguerreotype apparatus, and that the plaintiff had previously obtained a judgment in replevin therefor against Bennett, one of the defendants, and nominal damages for the detention; and it was objected that this judgment in replevin was a bar to the present action. Chapman, J.:—"The court are of opinion that this objection is valid. If the defendants had destroyed, concealed, or sold a portion of the property, so that it could not be replevied, the plaintiff might have had some reason to contend that he had a right to replevy that part of the property that could be found, and to maintain a separate action to recover the value of that which had been thus severed from it. But we have no occasion in this case to decide that question. The defendant Bennett stands upon the maxim '*Nemo debet bis vexari pro una et eadem causa*;' and in this action, he is a second time sued for a single and indivisible act. As to him, at least, it is an unnecessary multiplication of actions. The plaintiff having obtained a judgment in replevin against Bennett for a part of the property, and also a judgment for nominal damages, the court are of opinion that he cannot maintain the present action against Bennett and Hood jointly for further damages for the taking and detention of the whole property, the whole having been restored to him. The principle insisted on by the plaintiff, that an action will lie against each of several cotrespassers, and that the plaintiff may elect *de melioribus damnis*, is not applicable to the present case. The authorities on the point are collected in the note to Broome v. Wooton, Yelv. Am. ed. 67. They do not decide that after obtaining a judgment in re-

purchaser of goods sold by an officer, will not bar an action of trespass against the officer for the original taking. The owner of the goods having been deprived of their use by their seizure and detention previous to the sale, such injury would not be compensated by success in the replevin suit.¹

§ 582. There is some conflict of authority as to whether in an action of trespass for taking and carrying away goods, a judgment in trover for the value of the goods without satisfaction, against one of two joint wrong-doers, will constitute a defense.* There are technical reasons and legal decis-

plevin against one trespasser, he may afterwards sue the other for damages. Still less do they decide that he may afterwards maintain a joint action against both" (citing *Farrington v. Payne*, 15 Johns. 432; *Bates v. Quattlebom*, 2 Nott & McCord, 205; *Fetter v. Beale*, 1 Salk. 11).

¹ *Nagle v. Mullison*, 34 Penn. St. R. 48.

* In *Broome v. Wooton*, reported Yelv. 67; Cro. Jac. 73; Moore, 762, the suit was trover for plate. Plea, former recovery of judgment against J. S. for the same plate. Though the judgment was not satisfied, it was agreed that it was a good bar. Popham, in this case, said: "If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, he shall not have a new action again for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two, is, because there every of them is chargeable for the entire debt, and, therefore, a recovery against one is no bar against another, till satisfaction." He here distinguishes between a tort by several, and an obligation joint and several, where each is severally liable for the entire debt, and upon his several promise. The authority of this case is impliedly recognized in *Lacon v. Barnard*, Cro. Car. 35, which was a suit in trover for certain sheep. Plea, that the plaintiff had recovered judgment in an action of trespass, alleging a conversion of the same sheep, and judgment still in force. To avoid the bar of this judgment, the plaintiff replied that the damages were only recovered for the taking and detention, and not for the conversion. It was conceded that if damages had been given for the conversion, and judgment therefor, the plaintiff would be barred; but as the judgment was not for that, the replication was sufficient.

The learned editor of Yelverton, in a note to the case of *Broome v. Wooton*, says that the point decided in that case has never been otherwise decided. There is no case—we find none—in which it has been expressly held that a judgment against one joint trespasser, without satisfaction, will not bar a suit against the other. There are cases, where the judgment had been satisfied, in which it was held that judgment and satisfaction will bar, and where stress is laid upon the fact that the judgment was satisfied. These cases are consistent with the case in Yelverton, and the doctrine announced by Baron Parke, and afterward by Jervis, C. J. Judgment and satisfaction would bar another suit against any party jointly liable. It would also bar every concurrent remedy for the same thing, even when no joint action would lie. But this is not inconsistent with the idea that a judgment against one of two persons jointly guilty will, without payment, bar any further suit against the other.

The authority of the case of *Broome v. Wooton* is recognized by Baron

ions in support of the doctrine that such judgment, if execution be taken out thereon, is to be regarded as a bar. With this qualification, the cases, if not entirely reconcilable, will be found more consistent with each other.^{1*}

Parke in delivering judgment in *King v. Hoare*, 13 M. & W. 494. The case was one of joint contract, in which the plea was by one of the debtors of a former recovery against the other for the same debt. He said: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim—*transit in rem judicatam*; the cause of action is changed into matter of record which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true when there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit; and the cause of action being single, cannot afterward be divided into two." Referring to, and commenting upon, the case of *Broome v. Wooton* as one that decides that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause, he said: "We do not think that the case of a joint contract can be distinguished in this respect from a joint tort. There is but one cause of action in each case. 'Whether the action is brought against one or two, it is for the same cause of action.' The only difference is, that if one joint debtor be sued alone, he may plead in abatement the non-joinder of his co-contractor, which a joint tort-feasor cannot do. This difference arises, not from the fact that there is more than one cause of action, but that one joint wrong-doer cannot call upon the other for contribution to the damages recovered."

¹ *White v. Philbrick*, 5 Maine, 147; *Hunt v. Bates*, 7 R. I. 217; *Sanderson v. Caldwell*, 2 Aik. 195; *Sheldon v. Kibbe*, 3 Conn. 214; *Osterhout v. Roberts*, 8 Cowen, 43; *Livingston v. Bishop*, 1 Johns. 290; *Sharp v. Gray*, 5 B. Mon. 4; *Jones v. McNeil*, 2 Bailey, 466; *Walker v. Farnsworth*, 2 Kent's Com. 388, note c; *ante*, § 61.

* In the case of *Buckland v. Johnson*, 6 J. Scott, 80, Eng. C. L. 145, the goods of the plaintiff had been wrongfully converted by the defendant and his son jointly, by selling them. The proceeds of the sale were received by the defendant alone. The suit against the defendant was for the moneys received for the sale of the goods, as money had and received to the plaintiff's use, and he was also charged with converting the plaintiff's goods. The plaintiff had sued the son alone, and recovered £100 as the value of the goods converted, but had not obtained satisfaction. This matter was pleaded by the defendant. and the court adjudged it a sufficient answer. *Jervis, C. J.*, in delivering judgment, said: "The authorities show, that if the son had received this money, as well as converted the goods, and *Buckland* had sued him in trover, and obtained judgment against him, though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received; upon the same principle, if two jointly convert goods, and one of them receives the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received, to recover the value of the goods for which a judgment has already passed in the former action." He quotes and adopts the reasoning of *Baron Parke*, in *King v. Hoare*, and says, in conclusion: "The right of action is merged in the judgment. It is the judgment that disposes of the matter, and not the pay-
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§ 583. Where in an action for injuries committed on two different occasions, the trial, on motion of the defendant, proceeds as to one, a verdict for the plaintiff therein will not bar a second action for the other injury. In an action of trespass for injuring two horses of the plaintiff, one of the horses having been injured on one day and the other horse on another day, the plaintiff, on motion of the defendant, elected to proceed for the injury done to the horse that survived, and a verdict for the damages thereby sustained was found for the plaintiff. The plaintiff in the first action having died, his executors afterwards brought an action for the injury done to the horse that was killed, and the defendant pleaded a former recovery for the same trespass, to which the plaintiff replied, setting forth the foregoing facts. It was held that the plaintiff was entitled to recover, it being manifest from the facts disclosed by the replication that his testator never received any compensation for the injury last complained of, and that it was upon the motion of the defendant

ment." He had before said; "The whole fallacy of the plaintiff's reasoning, is his losing sight of the fact, that by the judgment in the action of trover, the property in the goods was changed by relation, from the time of conversion, and that, consequently, the goods from that moment became the goods of the son, and when the defendant received the proceeds of the sale, he received the son's money—the property of the goods being then in him." Maule, J., in the same case, said of the plaintiff: "Having his election to sue in trover for the value of the goods, or for the proceeds of the sale, as money had and received, he elected the former, and has obtained judgment. He has, therefore, got what the law considers equivalent to payment, viz.: a judgment for the value of his goods. The circumstance that the present defendant was a joint converter, or a stranger, makes no difference. If he were a stranger, the plaintiff, having once recovered in respect of the same goods, cannot recover again the same thing against anybody else. There is an end of the transaction. Having recovered a judgment, his remedy is altogether gone. His claim was satisfied as against all the world."

In *Adams v. Broughton, Andrews*, 18, which was also an action of trover, the plea was a former judgment in trover, against one Mason, for the same goods. The court said: "The property in the goods was altered by the judgment. The damages recovered are the price of the goods, and Mason has the same property as the plaintiff had, and this against all the world. The plaintiff cannot say the goods are his." The damages in this case, were for the conversion of the goods to the use of Mason, and their entire loss to the plaintiff. This was the cause of action merged in the judgment. It was not for the goods themselves, but a suit to recover their value, and assumed that they were no longer the goods of the plaintiff, but had wrongfully, it is true, but actually, by the conversion, become the goods of the defendant.

that the injury now charged was not submitted to the jury.¹ *

4. *Plea.*

§ 584. The defendant may deny the taking, or he may justify it on the ground of his own individual right to the property, or his authority as an agent of the true owner. He may not, unless he sees fit, invoke his official character at all, or he may do so, and plead that as an officer having legal precepts against the plaintiff himself, or any third party, he took the goods. In the latter case, the question to be tried would be the title of such third party as against the plaintiff's title.²

§ 585. A plea is good which substantially, though informally, sets out the defense. In *Burdick v. Worrall*,³ which was an action for driving against and injuring the plaintiff's carriage, the plea averred that the defendant, just before the collision, drove his wagon on the right side of the center of the road, so as to permit the carriage in which the plaintiff was riding to pass without interference, but that the plaintiff's carriage was not kept and seasonably turned to the right of the center of the road, and thereby they came in contact with each other by the negligent and unlawful manner in which the plaintiff's carriage was driven, which caused the damage. If the defendant had averred directly that the plaintiff was carelessly driving on the wrong side of the road, and thereby caused the accident, there could have been no doubt as to the sufficiency of the plea. The objection to it was, that the averment was not positive that the plaintiff's carriage was on the wrong side of the highway, but that the fact, if it existed, was left to be

¹ *Snider v. Croy*, 2 Johns. 227.

² *Dane v. Gilmore*, 49 Maine, 173.

³ 4 Barb. 596. And see *Earing v. Lansingh*, 7 Wend. 185.

* In this case it was held, that as the form of the replication was defective, being argumentative, instead of traversing and denying a former recovery for the same matter, it might be amended on payment of costs.

inferred. It was held, that as the plea substantially, although informally, averred that the defendant was on the right side and the plaintiff on the wrong side of the highway, it was certain to a common intent, and that the allegations made out *prima facie* a valid defense.* But where the defendant is an infant, unless he aver that the injury complained of occurred through his unskilfulness, want of knowledge, discretion and judgment, the court are bound to presume that the injury was wilful.¹

¹ Campbell v. Stakes, 2 Wend. 137.

* In Burdick v. Worral, *supra*, the replication stated that the traveled part of the highway was fifty feet wide; that the plaintiff was proceeding easterly at the rate of a mile in twelve minutes, and the defendant westerly at the rate of a mile in four minutes; that the plaintiff's wagon was within one foot of the north (left) side of the traveled part of the highway; that there was a space of the traveled road fifteen feet wide between the plaintiff's wagon and the center, over which the defendant might have passed without interference or interruption, and that the defendant, just before the wagons came in contact, drove his wagon across such last mentioned space, and unnecessarily ran against the plaintiff's carriage, and that the collision happened without any carelessness on her part or on the part of her driver. The question was, whether these allegations satisfactorily answered the special plea, and thereby sustained the declaration. It was held that the replication was defective in not setting forth some fact to show that the plaintiff or her driver was not careless in being on the wrong side of the highway, or averring that the defendant intentionally and unnecessarily inflicted the injury. The court said: "It is admitted that the plaintiff was on the wrong side of the road. That unexplained would indicate carelessness on her part. The general allegation that there was none is not sufficient to rebut the inference without the averment of some fact to support it. If there was a valid excuse for her being there, such as that the highway was impassable on the other side, or that she was about alighting at home, or on a visit at the place where she was, that should appear affirmatively. From anything that is said, it does not appear but that she was wrongfully and negligently on the left side of the highway. If so, and the defendant had even been negligent, although that is not directly averred, but may possibly be inferred from his traveling at so rapid a rate, the plaintiff could not recover. The rule is well settled that if the plaintiff's negligence in any way concurs in producing the injury which would not have happened without it, the defendant is entitled to judgment. Certainly, if the plaintiff had prudently kept on the right side of the road no injury would have occurred. The plaintiff's negligence, however, would not have justified any intentional and unnecessary damage by the defendant. If he crossed the space between the plaintiff's wagon and the center with the intention of producing the collision, he should be made to pay the damage. But, then, such intention should have been expressly averred. It cannot be inferred simply from the fact of his driving in that direction. He may have supposed, and from what is alleged he had a right to suppose, until he came too near to avoid the collision, that the plaintiff's driver intended to comply with the law. Persons often drive on the public highway at a rapid rate until they are near each other, in such a course that it would be impossible to escape from injury unless each turns as the law directs. In such cases the safety of men's lives often depends upon the prompt observance of the rule to keep to the right."

§ 586. The general issue will operate as a denial of the defendant's having committed the trespass alleged,¹ but not a release of the trespass, or any other matter which does not show the taking lawful.² * In *Fuller v. Rounceville*,³ which was an action for taking and carrying away the plaintiff's sleigh, the defendant offered in evidence a mortgage prior in point of time to the title of the plaintiff, and proof of peaceable possession taken of the property mortgaged by the defendant as agent of the mortgagee, the taking possession in that manner being the act complained of. It was held, that as the matters of defense relied on were a direct denial of the allegation of property in the plaintiff, as well as of all right of possession in him as against the defendant at the time of the trespass, they were admissible under the general issue. But in an action of trespass for carrying away a quantity of rails which had been previously scattered by the plaintiff along the line of land occupied by the defendant in order to construct of them a fence, to which the general issue was pleaded, it was held, that upon proof that the defendant took the rails from where they were laid, and piled them in a different part of the lot, the plaintiff was entitled to recover their value; that if the defendant had desired to show in what capacity he was occupying, or that the rails were unlawfully placed upon the land, or that they were the occasion of injury to it, and he had removed them to prevent such injury, or had taken them by the license of the plaintiff, such facts should have been pleaded.⁴ The defendant cannot introduce under the general issue evidence to show that the act complained of was done by virtue of legal process.⁵

¹ 3 Nev. & M. 9; 5 B. & Adol. 9; 10 Bing. 471; 2 C. & M. 23; 2 Dowl. P. C. 325.

² *Wilcox v. Sherwin*, 1 Chipman, 72.

³ 9 Fost. 554.

⁴ *Strong v. Hobbs*, 20 Vt. 185.

⁵ *Butterworth v. Soper*, 13 Johns. 443.

* In an action of trespass for killing a slave, it was proved under the general issue that the slave was shot and killed by the defendant while he was trying to retake him as a runaway at the request of the plaintiff. A verdict having been rendered for the defendant, a new trial was ordered, with leave to the defendant to plead specially, unless he should enter satisfaction for the costs (*Bradley v. Flewitt*, 6 Rich. 69).

Drake v. Barrymore¹ was an action of trespass brought by Barrymore in the court below against Drake and two other persons for taking and carrying away the plaintiff's hog, to which the defendants pleaded the general issue. On the trial, the defendants offered to prove that two of the defendants were trustees of a school district, and had regularly issued a warrant to Drake as collector of the district, and that he took the hog under that warrant; but it was held that the justification under the collector's warrant could not be admitted under a plea of not guilty.* And where an action is brought by a tenant against his landlord for a wrongful distress, the defendant cannot justify the taking under the general issue unless the goods were seized upon the demised premises.²† The rule that all of the part owners of a chattel must join in the action, being for the benefit of the defendant, he may waive the right to insist upon it by not raising the objection by plea in abatement. He cannot take advantage of the irregularity under the

¹ 14 Johns. 166.

² Oliver v. Phelps, 1 Spencer, 180.

* By the statute of James 1st, it was first enacted that in actions brought against certain officers therein named and their assistants for any act done in their respective offices, the defendant might plead the general issue, and give in evidence any special matter which, had it been pleaded, would have been sufficient to have discharged the defendant of the trespass. It was made in favor of certain officers only, who were frequently exposed to vexatious suits for acts done in the execution of their several offices. The expense, delay and vexation of pleading specially a justification in every such case must have been extremely burdensome. Besides, so strict were the rules of pleading held, both as to matter of form and substance, that few cases could come to trial on their real merits. For this reason, it was in the power of a few litigious persons to ruin an officer in public trust, though acting with the utmost integrity, and the fullest knowledge of his duty.

† The first count in trespass was for seizing and carrying away certain goods, chattels and effects of the plaintiff, to wit, &c. Fifth count for tearing away, severing and removing divers fixtures of the plaintiff. Pleas, first, not guilty; secondly, a justification to the first count by taking the goods and chattels as a distress for rent due from the plaintiff. Replication denying the tenancy, and issue thereon. The judge at the trial directed the jury that the justification covered the whole declaration. A verdict was, however, found for the plaintiff, with one farthing damages. It was held that the justification was *prima facie* an answer to seizing and carrying away in the first count, and that the plaintiff, if he intended to rely on some of the articles being fixtures, ought to have replied that fact, but that the justification was no answer to the trespasses stated in the fifth count (Twigg v. Potts, 1 C. M. & R. 89; 3 Tyr. 969).

general issue, although it appear from the plaintiff's own showing that he is only a part owner.¹

§ 587. Where in an action of trespass for taking goods, the defense is that they were taken under process, the plea must specify and particularly describe the process, and set out every fact necessary to show the justification; otherwise it will not be allowed in evidence.² But it need not state the cause of action for which the warrant was issued.³ If the defendant justify as plaintiff in a suit in an inferior court, under mesne process of that court, he must allege, in his plea, that the cause of action arose within the jurisdiction;⁴ and that the process has been returned.⁵ In justifying a trespass under the process of a foreign court, a plea which only states that the court abroad was governed by foreign laws; that the property seized was within its jurisdiction; that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf; that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property, is bad, being too general, and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause, or of what nature the charge was, or by whom instituted, or what the order of seizure was.⁶ Although, where the action is against an officer for levying upon property, the defendant need not plead the judgment, nor show a sale of the property taken,⁷ * yet he ought to describe the execution with suffi-

¹ *Lothrop v. Arnold*, 25 Maine, 136; *Pickering v. Pickering*, 11 N. Hamp. 141; 12 Ib. 148; *Hart v. Fitzgerald*, 2 Mass. 511; *Patten v. Gurney*, 17 Mass. 182; *Bradish v. Schenck*, 8 Johns. 151; 1 Chit. Pl. 52, 53.

² *Harrison v. Davis*, 2 Stew. 350.

³ *Linsley v. Keys*, 5 Johns. 123; *Belk v. Broadbent*, 3 Term R. 183.

⁴ *Evans v. Munkley*, 4 Taunt. 48; *Trevor v. Wall*, 1 T. R. 151.

⁵ *Middleton v. Price*, 1 Wils. 17; 2 Stra. 1184; *Rowland v. Veale*, Cowp. 20.

⁶ *Collett v. Keith*, 2 East, 260; 4 Esp. 212. ⁷ *Burton v. Sweaney*, 4 Mo. 1.

* In an action against an officer for seizing the property of the plaintiff upon executions against a third person, it was held that a special plea, in which the defendant set up a bond of indemnity executed by the plaintiffs in the executions, need not recite the judgments on which the executions issued (*Davis v. Davis*, 2 Gratt. 363).

cient certainty, stating out of what court or by what authority it issued, and giving such information in the defense as may show the plaintiff what is relied upon.¹

§ 588. Where an officer justifies the seizure of property in the hands of a third person, he must plead his justification specially, it being new matter.² It is no defense that a third person is the true owner, unless the wrong-doer connect himself with the true owner.³ If the plaintiff have the possession and apparent ownership of the goods, a plea that they belong to a third party puts no more in issue than not guilty, and is bad for the reason that it denies the plaintiff's possession.⁴ * In an action of trespass for taking and carry-

¹ Cook v. Miller, 11 Ill. 610; Simpson v. Watrus, 3 Hill, 619.

² Glazer v. Clift, 10 Cal. 303.

³ Wooley v. Edson, 35 Vt. 214.

⁴ Carter v. Johnson, 2 M. & R. 263; Heath v. Milward, 2 Bing. N. C. 98; Nelson v. Cherrill, 1 M. & Scott, 452; 7 Bing. 663; Ashmore v. Hardy, 7 Car. & P. 501; Davis v. Hooper, 4 Stew. & Port. 231; Brown v. Artcher, 1 Hill, 266.

* To an action of trespass for seizing the goods of the plaintiff, the defendant pleaded that one C. recovered a judgment against F., and sued out a writ of *fi. fa.* directed to the sheriff of Cheshire, by virtue of which writ the defendant, as such sheriff, seized the said goods and chattels of the said F., which are the said several alleged trespasses, &c. It was held, on demurrer, that the plea was bad (Harrison v. Dixon, 13 L. J. N. S. 247; 1 Dowl. & L. 454; 12 Mees. & W. 142).

In Demick v. Chapman, 11 Johns. 132, Chapman brought an action of trespass *de bonis asportatis* in the Court of Common Pleas, against Demick, who pleaded the general issue. On the trial, the defendant offered to prove that the property in question belonged to one Ralph Chapman, by whom it was fraudulently conveyed to the plaintiff, and that the defendant seized it under an attachment against Ralph Chapman. This evidence being overruled, judgment was rendered for the plaintiff. The Supreme Court, in affirming the judgment, said: "The possession of the property by the plaintiff was *prima facie* evidence of right; and a mere stranger could not lawfully deprive him of that possession. The offer, therefore, to prove that the property belonged to Ralph Chapman could not excuse the taking by the defendant, without showing some authority or right derived from Ralph Chapman, amounting to a justification; and this was not admissible under the general issue. The taking was *prima facie* a trespass; and the excuse that it was done by virtue of an attachment issued by a justice of the peace, ought to have been pleaded specially. The transfer of the property, although with the design to defraud creditors, was valid as between the parties. And the defense, founded on the right of a creditor to defeat it by attachment, or by a judgment and execution, is very special, and ought to be disclosed by pleading. The defendant, in the court below, did not come in aid of the officer, or act under his command, so as to bring himself within the statute authorizing the special matter to be given in evidence under the general issue. The testimony was therefore properly overruled."

In Brown v. Artcher, *supra*, the court, per Cowen, J., discussed the principles of, and reviewed the decisions sustaining, the above-mentioned rule, as follows: "It was held in the Year Book (27 H. 8, 21, case II), that in trespass *de*

ing away from the plaintiff several horses, the defendant pleaded that one Sage being in debt to him, and having departed out of the State or kept concealed within it, with intent to defraud his creditors, the defendant had caused the property of Sage to be attached, including the horses in question, which had previously been conveyed by Sage to the plaintiff, with intent to defraud the creditors of Sage of their just debts; and that the defendant, in aid and by command of the sheriff, for the space of two days, did safely keep the said horses as the proper goods and chattels of the said Sage, which was the same trespass complained of by the plaintiff. It was held that the plea was good.¹ * If the plea

bonis a plea, that the goods were not the plaintiff's property was bad. The same thing was afterward admitted in *Wildman v. Norton*, 1 Ventr. 249. I believe it has never been denied. Chitty says that 'the defendant cannot plead property in a stranger or himself, because that goes to contradict the evidence which the plaintiff must adduce on the general issue in support of his case' (1 Chit. Plead. 527, Am. ed.) The usual test of an objection, that the plea amounts to the general issue, is, whether it takes away all *color* for maintaining an action, by fixing a negative upon the plaintiff's right, in the first instance. Thus, in trespass, *quare clausum fregit*, the defendant pleading title in a third person, a demise to himself, and an entry under that demise, this plea was held bad, because it showed a right of possession in the defendant at the time he entered and committed the trespass complained of (*Collett v. Flinn*, 5 Cowen, 466). So a plea that he entered under a license from such third person (*Underwood v. Campbell*, 11 Wend. 78). Such a plea standing alone virtually says that the defendant did not commit any trespass in the plaintiff's close; and is therefore but another mode of pleading not guilty. It absolutely and necessarily denies all possessory right in the plaintiff, the contrary of which he must maintain, or he is not entitled to sue. Such a plea is said, by the books, in itself to take away all color or pretense for an action; and therefore, to be maintainable as a special plea, it must surmise some possession in the plaintiff, at the time, under color of a defective title. Taking away, in itself, all *implied color*, it must, in the manner mentioned, substitute what is called *express color*. The same rule of pleading has been applied to trespass *de bonis* (*Leyfield's Case*, 10 R. 90). Chitty says, a plea that A. was possessed of the goods in question as of his own proper goods, amounts to a denial that the plaintiff had any property in them, and therefore gives no color of action in itself. To remedy this defect, it must surmise that the defendant bailed the goods to a stranger who delivered them to the plaintiff, from whom the defendant took them; or a possession of the plaintiff under some other defective title. It is peculiar to the action of trespass that the defendant may surmise such possession, setting up a mere fiction, not traversable, and thus turn what would otherwise be defective, as amounting to the general issue, into a special plea. But if such express color be not given, the plea of property in a stranger or the defendant is emphatically defective in the case of trespass *de bonis*; for there especially, no actual possession being expressly shown in the plaintiff, the law intends that it is with the general owner."

¹ *Patcher v. Sprague*, 2 Johns. 462.

* The plea of not possessed, in an action of trespass for taking the plaintiff's goods, puts in issue the plaintiff's title to, as well as the possession of, the goods (*Harrison v. Dixon*, 13 Law J. N. S. 247).

justifies the taking, it need not traverse the detention and conversion.¹ A declaration in trespass to goods charged the defendant with taking and carrying them away, and also with converting them to his own use. It was held that such conversion was merely matter of aggravation, and that a plea to the whole declaration, justifying the taking of the goods and carrying them away, but omitting to justify their conversion, was good.² Where the defendant pleads that the goods were taken by virtue of a writ of replevin, he must allege that a bond was given pursuant to the statute, before the property was delivered to him.³*

§ 589. In a plea of justification, by a collector under a rate bill and warrant to collect a tax voted by a town, it is not necessary to allege that the town was a corporation, or to show any charter of incorporation. It may be generally true that where a justification is relied on, founded upon the acts of a corporation, the existence or charter of incorporation must be set forth, especially where the corporation is a private one or created for private purposes. Although it has been considered that this principle extends to some corporations created by public laws, for a limited or particular purpose, as in the case of a school district, yet the principle cannot be extended to political corporations created by public statutes principally for public purposes, and not for the special benefit of the members of the same. Towns are corporations of this nature. Their corporate powers are given

¹ *Burton v. Sweaney*, 4 Mo. 1; *Dye v. Leatherdall*, 3 Wils. 20.

² *Pratt v. Pratt*, 17 L. J. 299.

³ *Moors v. Parker*, 3 Mass. 310; *Cushman v. Churchill*, 7 Ib. 97.

* In *Moors v. Parker*, *supra*, the court said; "A plaintiff in replevin cannot protect himself by the execution of his writ, unless the officer pursue the authority which he derives only from the writ. The authority to the officer to replevy and deliver the goods to the plaintiff is conditional. The plaintiff must first give him a bond, with sureties, in the penalty and with the condition required by the writ. And if the plaintiff give him this bond, yet the goods are irrepleviable if they are detained as the plaintiff's on mesne process, warrant of distress, or on execution; and if the officer should deliver goods so detained, he will be a trespasser, the writ being no justification for him. The defendant ought, therefore, to have alleged in his bar that before the delivery he had given the coroner the bond required by his writ, and also that the goods were not so detained as to be irrepleviable by that writ."

by public statutes, and are of public notoriety. Their corporate existence or powers are not derived from their charter, which is rather a grant of land than a charter of incorporation. The persons residing within the territorial limits of a town, are made members, not on their petition or request, but without their consent; and are required to perform duties for the benefit of the whole public, such as making and repairing roads, building bridges, and taking care of the poor within their territorial limits. As a branch of the government, and as a corporation or institution created for public and political objects, not by a charter, but by a public and general statute, courts must take notice of their existence and recognize their powers and privileges. It is not, therefore, necessary to set forth in a plea, either their existence or their authority as a town.¹ The plea need not state the purposes for which the tax was voted. The liability of the plaintiff is sufficiently alleged by averring that he was an inhabitant of the town, having taxable property therein, that a rate bill was made out, and that he was assessed in the sum mentioned.^{2 *}

§ 590. A special plea admits all it does not deny; but not the trespasses precisely as laid, in kind, degree, extent, or value. As to acts done, a special plea, if not supported, is much like a judgment by default. It admits a cause of ac-

¹ Briggs v. Whipple, 7 Vt. 15.

² *Ibid.*

* In Briggs v. Whipple, *supra*, the court said: "Taking into consideration that all these taxes are to be laid for public purposes, that they are voted by the persons who have to pay the same, that the controversy is usually between inhabitants of the same town, we think it not unwarrantable to make a presumption in favor of the legality of the proceedings of a town in voting a tax, until the contrary is made to appear, and to cast the burden of proving its illegality on the person contesting the same, if the tax was voted at a legal meeting of the inhabitants in pursuance of a previous warning. It follows that it will be sufficient for any person, justifying under a tax laid by a town, to state that it was voted at a legal meeting of the town duly warned, leaving those who contest its validity to specify the particulars wherein it is illegal or invalid."

In Iowa, where an action of trespass was brought against a county treasurer for taking personal property for the non-payment of taxes, under a warrant of the county judge, attached to the tax list, commanding him to collect the taxes therein mentioned, it was held that he need not set out, with a copy of the warrant, the tax list; but that an averment in his answer of his readiness to produce the tax list was sufficient (Games v. Robb, 8 Clarke, Iowa. 193).

tion of the general nature set forth; but everything else must be shown in proof, unless exact precision in the admitted allegation be material to the plaintiff.¹*

5. *Replication.*

§ 591. Although, as already stated,² the plaintiff need only traverse the substantial averments of the plea, yet a replication which leaves the defendant in uncertainty as to the point to be contested, is bad. Where, for instance, the plaintiff replied to a plea which justified the taking as an officer under an attachment, that the defendant did not attach said goods by virtue of said writ, it was held that, as the replication put in issue both the fact of the attachment and the authority by which it was made, it was double and uncertain.³ So, likewise, a replication *de injuria*, also new assigning that the goods were taken as a distress not only for the sum alleged in the justification, but also for another sum, &c., is double.⁴ But a replication to a plea justifying the removal of the chattels because they incumbered a close, as to a part of the goods *de injuria*, and as to the other part, extra force and violence, was held good on special demurrer.⁵† In trespass against B. & C. for seizing and

¹ Rich v. Rich, 16 Wend. 663; Wagener v. Bell, 4 Monr. 7; Haley v. Cal-ler, Minor, 63.

² *Ante*, § 86.

³ Briggs v. Mason, 31 Vt. 433.

⁴ Gisborne v. Wyatt, 1 Gale, 35; Thomas v. Marsh, 5 Car. & P. 596.

⁵ Vivian v. Jenkin, 3 Nev. & M. 14; 1 Har. & W. 468; 3 Ad. & E. 741.

* Where it appeared that the plaintiff owned absolutely some of the goods injured, and was part owner of the rest, it was held that a refusal to exclude evidence of the trespass to the goods of which the plaintiff was only part owner, was correct, the defendant not having raised the question of ownership in his plea (Lefebvre v. Utter, 22 Wis. 189).

† In an action of trespass for taking cattle, the defendant justified the taking as school district collector. He pleaded the organization and existence of the district, the warning and holding of the school district meeting, the voting of a tax, the liability of the plaintiff to be taxed, the assessment of the tax by the prudential committee of the school district, the delivery to the defendant of a warrant for the collection of the tax, and his proceedings thereunder in taking and disposing of the property referred to in the plaintiff's declaration. To this plea the plaintiff replied that he ought not to be barred because the supposed tax was not legally and duly assessed by the then prudential committee upon the lists of the district. It was urged that the replication was defective

converting the goods of A., B. alone justified the seizure and impounding of the goods as a distress for rent, within thirty days after they had been wrongfully removed from the demised premises. A. now assigned that he brought his action, not for the trespasses in the plea mentioned, but for that B., after the seizure, and after payment and acceptance of the rent and expenses, and after he ought to have restored to A. the goods so distrained, retained possession thereof, and sold and disposed of them. It was held that this was no departure.¹*

§ 592. If an officer justify, under process, the taking away of goods and converting them to his own use, which is unwarrantable, but qualifies it after, by saying that he took them for the purpose of attaching the plaintiff according to the exigency of the writ, he throws it on the plaintiff to show the excess in his replication.² When an officer justifies under a legal warrant, acts relied upon to make him a trespasser *ab initio* should be newly assigned.³ Where the officer justifies, under an execution, a defect in the replication in not alleging that the execution was paid and satisfied

in not being single—that it put in issue two or more separate and independent facts, each of which constituted a defense to the action, and that it was subject to the same objections that would exist to the general replication *de injuria*. It was, however, held that the replication was sufficient (*Moss v. Hindes*, 28 Vt. 279).

¹ *West v. Nibbs*, 4 C. B. 172; 17 L. J. C. P. 150.

² *Moore v. Taylor*, 5 Taunt. 69.

³ *Garrett v. Gwathmey*, 5 Blackf. 237.

* A declaration averred that the defendants wrongfully took the plaintiff's goods. The replication stated that the goods were taken by a sheriff at the instance and by the direction of the defendants. Held that there was no departure (*Richardson v. Hall*, 21 Md. 399).

In trespass to personal property, when the answer to the plea confesses and avoids it, the replication should be special. So, where, in breaking and entering the plaintiff's house or land, felling his timber, or taking away his goods, the defendant pleads a license which the plaintiff had revoked before any of the trespasses were committed, or which was confined to some particular thing, and the defendant exceeded it, the plaintiff must state the revocation or excess, in a new assignment. But there are some replications which rather partake of the nature of a new assignment than are properly and strictly so. As when a man abuses an authority or license which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant pleads such license or authority the plaintiff must reply the abuse (1 Chitty's Pl. 410-565, 567-568; *Dye v. Leatherdall*, 3 Wils. 20; *Taylor v. Cole*, 3 D. & E. 292; 1 H. Bl. 555; *Great Falls Co. v. Worster*, 15 N. Hamp. 412).

previous to the trespass, and how much money was paid, is cured by verdict.¹ *

6. *Evidence of possession.*

§ 593. In an action of trespass for taking personal property, the plaintiff is bound to show title to the property taken, or a rightful possession. In showing title, proof that he was in possession claiming title, is sufficient *prima facie* evidence to enable him to maintain the action; and no one but the true owner, or one connecting himself with the true owner, is at liberty to impeach his title.² Proof of title will not dispense with proof of possession, whether the plaintiff's title be derived from an absolute bill of sale, or a condition subsequent as a mortgage.³ The defendant is not put to his justification, until the fact of possession, either actual or constructive, is established by the plaintiff, which fact may be controverted by the defendant.⁴ A. brought an action of trespass against B. for taking two tables and a chair. B. pleaded not guilty. It was proved that B. took

¹ Davis v. Cooper, 6 Mo. 148.

² Hoyt v. Van Alstyne, 15 Barb. 568; Duncan v. Spear, 11 Wend. 54, and note.

³ Toby v. Reed, 9 Conn. 216; Davis v. Young, 20 Ala. 151.

⁴ Howe v. Farrar, 44 Maine, 233.

* Where, in trespass for detaining, after tender, goods distrained for arrears of rent, a new assignment began with stating that the plaintiff brought his action not only for the trespasses in the introductory part of the plea mentioned, &c., but also for that, &c., it was held that this inartificial averment was in the nature of a discontinuance which was cured after verdict (Ladd v. Thomas, 4 Per. & D. 9; 4 Jur. 798).

The place where the goods were taken, must in all probability be the place where the witnesses reside, and in that county the trial ought to be, not on the exploded notion for the purpose of having the cause tried by a jury of the vicinage, but because the convenience of the parties will be promoted by it, and there will be a saving of expense in regard to witnesses. In *Ross v. Lown*, 8 Johns. 354, which was an action of trespass for carrying away the goods and chattels of the plaintiff, the venue was changed upon the application of the defendant from Onondaga county to Saratoga county where the trespass was committed. The plaintiff now moved to return the venue to the county of Onondaga, on the ground that he had two or more material witnesses residing in the county. The court, in denying the motion, said: "By the practice of the King's Bench, on the present affidavit, the defendant would be entitled to change the venue unless the plaintiff stipulated to give material evidence arising in Onondaga; and without such stipulation, the venue ought to be retained where it now is, in Saratoga."

two chairs and a table in the house of D. But none of the witnesses knew A., and there was no evidence of any kind to connect A. with the goods taken in D.'s house. It was held that to entitle the plaintiff to recover on these pleadings, there must be some evidence to connect the plaintiff with the goods taken; and, that if there was no such evidence the defendant would be entitled to a verdict.¹* Where the plaintiff proves an actual purchase, payment of the consideration, and the taking and keeping possession of the property, the burden of proof is on the defendant if he seeks to impeach the title on the ground of fraud.²

7. *Proof of taking.*

§ 594. A wrongful taking may be proved although that phrase is not used in the pleadings.³ Where the property was taken by virtue of a warrant signed by the defendant, he not being present at the taking, and in no other way directing it, the plaintiff must produce the warrant; that being the best evidence of what the defendant did.⁴ When the action is against a United States collector, by the owner of a vessel which was seized, the sentence of restitution of the United States District Court, not appealed from and still remaining in full force, is conclusive evidence that the seizure was illegal.⁵†

¹ *Forman v. Dawes*, 1 Car. & M. 127.

² *Salmon v. Orser*, 5 Duer, 511.

³ *Buck v. Colbath*, 7 Minn. 310.

⁴ *Stebbins v. Cooper*, 4 Denio, 191.

⁵ *Hoyt v. Gelston*, 13 Johns. 141; *aff'd on error*, *Ib.* 561.

* In trespass for taking furze, where there was the general issue, and a plea of a right to estovers from a common, it was held that the defendant might, under the general issue, give evidence of an exclusive right of possession (*Pearce v. Lodge*, 12 Moore, 50).

In Maine, in a prosecution under the statute, for the wrongful destruction of property without the consent of the owner, it is not necessary to prove that the possession of the property was wrongful (*State v. Pike*, 33 Maine, 361).

† “After the decree of acquittal in the District Court, the same question could not be tried again in the action of trespass; and the decision that the vessel was not liable to seizure and forfeiture, under the charge alleged, was binding and conclusive in the action between these parties. The officer who seized goods on the ground of forfeiture, and causes them to be libeled and tried, has but two pleas in bar, in an action by the owner. These are, the judgment of the court, if the goods be condemned, and a certificate of probable cause, if the goods be acquitted. If he can show neither, he must answer for

§ 595. A substantial proof of the taking set out in the declaration will entitle the plaintiff to a verdict.* In an action for the penalty imposed by a statute of New York, for taking down or defacing any notice of a sale of real or personal property put up by a sheriff, it was proved that within an hour after the officer had posted the notice at McG.'s grocery, the defendant asked if the officer had left any notice there, took the notice from the counter, where it lay, and carried it away, saying that "he didn't want any such thing up with his name on" and that "it was his business to take them down, and he would take them all down;" that the officer posted the notice by pinning it to the wall; that the wind blew it down, and Mrs. McG. picked it up and laid it on the counter, till she could get something to put it up with, where it was lying when the defendant took it. It was held that the plaintiff was entitled to recover.¹†

the seizure in an action at common law. It would operate most injuriously to the plaintiff, if the acquittal of his vessel in the District Court was not to be held conclusive on the question of forfeiture, in all other courts. Suppose the Supreme Court in this case, had admitted as a legal justification the matter set up as a defense, and had held, in opposition to the decree of the District Court, that the vessel was lawfully seized. It is certain that such a decision could not work a forfeiture of the ship; for no other court but the District Court, has authority to condemn. The only effect of such a decision would be to deprive Hoyt of his remedy for the seizure and detention of his vessel. He and his vessel are to be deemed innocent as respects the United States, but guilty as respects the officer who seized. His property is fairly acquitted by the only court that has authority to try and condemn. The government, in whose name and on whose behalf it was seized and libeled, acquiesces in the justness of the sentence, and files no appeal. But when he attempts to sue the officer who did him the injury, a State court, which has no jurisdiction over the question of forfeiture, declares in favor of the lawfulness of the seizure and right of forfeiture, and thus deprives him of all redress. The law is settled, that if goods be seized by a custom house officer and are libeled, tried, and condemned in a court having cognizance of the forfeiture, and the seizing officer be afterwards sued in trespass for taking the goods, he may plead that condemnation in bar of the action. The question then is, suppose the goods to be seized, tried, and acquitted in the District Court, and the officer be then sued for seizing the goods, can the officer contest the legality of the seizure over again? or cannot the owner in his turn set up the sentence of acquittal as a bar to that inquiry? I entertain no doubt, it is equally well settled as the other; and that if the condemnation is a bar to the action on the one hand, the acquittal is a bar to the defense on the other" (The Chancellor delivering the opinion of the Court of Errors in *Gelston v. Hoyt*, 13 Johns. 561).

¹ *Murphy v. Tripp*, 44 Barb. 189.

* In an action for injury to personal property, evidence is not admissible of damage to goods not mentioned in the pleadings (*Whitmore v. Bowman*, 4 Greene, Iowa, 148).

† In *Murphy v. Tripp*, *supra*, the court said: "The object of the statute is

8. *Evidence as to value.*

§ 596. The plaintiff, in order to recover more than nominal damages, must prove the value of the property taken, or that he has sustained some special damage.¹

9. *Proof of time.*

§ 597. Although, as previously stated,² the time when the trespass was committed need not in general be proved as laid, yet if the party in pleading time refers to a record, the proof must correspond with the record. Where, therefore, in an action of trespass *de bonis asportatis*, the defendant pleaded that he took the goods as collector of a school district, by virtue of a rate bill and warrant, and averred that he was elected collector of the district on a certain day, "as by the records of said school district would more fully appear," and the records showed that he was appointed on a different day; it was held, that although it might not have been necessary to refer to the records, yet, having done so, the variance was fatal.³

10. *Attendant circumstances.*

§ 598. The attendant circumstances are proper subjects of proof.⁴ In an action for the wrongful seizure of the plaintiff's goods under an attachment, it was held that the fact that the plaintiff was broken up in business, and reduced to poverty without the means of support, was admissible to

to prevent any interference with the paper put up by the officer, and the contents thereof, which will defeat its purpose; that is, giving notice of sale. The circumstance that the notice had been accidentally blown down after the officer had posted it, and was lying on the counter, does not relieve the defendant, if his design was to frustrate the purpose of the officer, and to prevent notice of sale being given; and that such was his design the jury were warranted in finding, from the facts and circumstances presented by the testimony. If the defendant, with such design, had torn off a material part of the notice and carried it away, he would have been literally guilty of *defacing*. He is none the less guilty within the meaning of the statute, having carried away the whole notice.⁵

¹ Lay v. Bayless, 4 Cold. Tenn. 246; Burr v. Woodrow, 1 Bush, Ky. 602.

² *Ante*, §§ 73, 96.

³ M'Daniels v. Bucklin, 13 Vt. 279.

⁴ Zimmerman v. Helser, 32 Md. 274; Romaine v. Norris, 3 Halst. 80; *ante*, § 95.

show special damage.¹ But the doctrine that the circumstances attending a trespass may be given in evidence in order to enhance the damages, though not alleged in the declaration, has no application where the circumstances themselves constitute an independent cause of action; and the fact that the defendant, in protecting his own property as he supposed, injured the person of the plaintiff, is not an exception to the rule, where there is no allegation of personal injury.²

11. *Intention.*

§ 599. Although proof of motive is not necessary to sustain an action for taking and carrying away goods, yet with reference to the question of damages, the intention with which the act was committed, is sometimes important.³ * In *Wood v. Morewood*⁴ it is said to have been held by Parke Baron, in an action of trover for coals taken, that if the defendant took them without being conscious that he was doing wrong, they might be estimated as if they were to be sold by the plaintiff, unsevered; if otherwise, then at the price they would be worth when first severed. The jury returned the former, and the decision was acquiesced in. "This seems in conflict with the decisions in New York, but shows the leaning of the mind of a very distinguished jurist towards the equity of not allowing exemplary damages to be recovered against one not conscious of doing wrong, when he took the goods of another."⁵ In an action for taking a

¹ *Moore v. Schultz*, 31 Md. 418.

² *Plumb v. Ives*, 39 Conn. 120.

³ *White Water Valley Canal Co. v. Dow*, 1 Smith, Ind. 62; *Hillman v. Baumbach*, 21 Texas, 203.

⁴ 3 Adol. & El. N. S. 440, note.

⁵ *Whitman, C. J., Cushing v. Longfellows*, 26 Maine, 306.

* Whether or not persons seizing goods exposed for sale contrary to the statute against the disturbance of religious meetings (*Elm. Dig. Sts. of N. J.* 458) have committed a trespass, will depend upon the intention with which the goods were seized, and not upon the subsequent irregular conduct of those making the seizure, although such subsequent conduct might be given in evidence to show the intent. The intention in such case being for the jury or court below to determine, it cannot be reviewed by the Supreme Court on certiorari (*Rogers v. Brown*, 1 *Spencer*, 119).

slave from the plaintiff, abusive language of the defendant to the plaintiff at the time, was allowed in evidence to show *quo animo* the act was done, and to increase the damages.¹ *Churchill v. Watson*² was an action of trespass for taking a stick of timber belonging to the plaintiff. At the trial in the Circuit Court, the taking of the timber by the defendant having been proved, the plaintiff, in order to show the actual damage he had sustained, offered to prove the following: That he was building a vessel, and had procured the timber for her mast; that there was no other spar on the Connecticut river suitable for a mast of such a vessel; that this was well known to the defendant; that the taking of the spar by the defendant was malicious, and with intent to obstruct the plaintiff, and prevent his building and completing the vessel; and that, in consequence of the taking, the plaintiff was greatly obstructed in building his vessel, and prevented from completing the same. The judge, however, rejected this evidence, and, in charging the jury, adopted the principle that damages were to be given for the value of the property with interest, and presumptive damages for the force only, without taking into consideration any of the aggravating circumstances attending the trespass, or the actual damage which the plaintiff had sustained. The Supreme Court, in delivering the opinion granting a new trial, in which all the judges concurred, said: "The jury ought to have taken into consideration, in assessing the damages, that the taking by the defendant was malicious, and with intent to obstruct the plaintiff and to prevent the building of his vessel; and all the circumstances attending the transaction ought to have been heard and considered. If the defendant, in a quarrelsome manner, had interfered with the building of the vessel, and by threats had attempted to induce the plaintiff to desist, and failing in this, and knowing that no other spar could be obtained, and, with a view to prevent the building of the vessel, had taken it away forcibly, or wantonly

¹ *Ratliff v. Huntley*, 5 Iredell, 545.

² 5 Day, 140.

destroyed it, a jury might give a larger sum in damages than they would do had it been taken under a mistaken apprehension of the rights of the parties."

§ 600. To make loss of credit admissible in evidence, in an action of trespass for seizing and detaining the plaintiff's goods, it must be shown to be intimately connected with the act complained of, and to have been done with an aggravating and malicious intention to injure the party complaining.¹

12. *Presumptions.*

§ 601. We have heretofore spoken of the presumption of fraud in the absence of explanation, where goods sold are left in the possession of the vendor.² In an action of trespass for taking goods, the defendant pleaded that the goods did not belong to the plaintiff, in manner and form as alleged. The plaintiff proved that he had purchased them of the sheriff under an execution issued against one Brennan. The defendant proved that he had subsequently taken them in execution as the goods of Brennan, they being at the time in Brennan's possession. It was held, that this evidence was admissible, and that it was proper for the judge to leave it to the jury to say whether the previous sale to the plaintiff was *bona fide* or fraudulent.³

§ 602. Evidence that a party has on one occasion committed an offense, is incompetent to show that he subsequently committed a distinct offense of a similar nature, except in a few cases where guilty knowledge or intention is of the essence of the charge. Therefore, in an action against an officer for seizing, under the statute, a conveyance used in the transportation of intoxicating liquors, the defendant will not be permitted to prove that the plaintiff, prior to the enactment of the statute and for several years previous, was

¹ Thomas v. Isett, 1 Iowa, 470.

² *Ante*, § 562.

³ Ashley v. Minnett, 3 Nev. & P. 231; 8 Ad. & E. 121; 2 Jur. 888.

engaged in illegal traffic in intoxicating spirits, such evidence having no logical or legal tendency to prove any matter in issue at the trial.¹ But where an individual in failing circumstances is proved to have disposed of large portions of his property by fraudulent sales, to defeat or delay creditors, it tends to show a similar fraudulent intent on his part as to the disposition of any remainder of his property he may attempt to put out of his hands at or about the same time. Such evidence, however, does not affect the vendee, but merely shows a fraudulent intent on the part of the vendor. To affect the vendee, it must be shown that he knew and participated in the intent. *Blake v. White*² was an action of trespass for taking two horses alleged to be the property of the plaintiff. The defendant denied that the plaintiff owned the horses, and contended that they belonged to one James L. Blake, a brother of the plaintiff, as the property of whom they were attached on mesne process, and sold on execution. Evidence was offered that the horses were purchased by James L. Blake with money furnished him for that purpose by Oliver Blake, the plaintiff, and that the horses, after the purchase, were appraised to Oliver in payment of the money advanced by him. It was, however, contended by the defendant that this was merely a fraudulent arrangement for the cover of property, and that the purchase was in fact made with James L. Blake's means, and for his use. It was held, that the entire business transactions betwixt James and Oliver in relation to other property was clearly competent, as showing a general design on their part to obstruct and delay the creditors of James.³*

¹ *Kent v. Willey*, 11 Gray, 368.

² 13 N. Hamp. 267.

³ See *Foster v. Hall*, 12 Pick. 89; *Bridge v. Eggleston*, 14 Mass. 245; *Hawes v. Dingley*, 5 Shepl. 341; *Howe v. Reed*, 3 Fairf. 515; *Lovell v. Briggs*, 2 N. Hamp. 223; *Flagg v. Willington*, 6 Greenl. 386; *Whittier v. Varney*, 10 N. Hamp. 291.

* Where, in an action of trespass *de bonis asportatis* by the vendee of goods, the plaintiff makes the vendor a witness to prove that they belong to the plaintiff, the acts and declarations of the witness, after he parted with his interest, are admissible to discredit him, but not as evidence of property in the witness (*Fiske v. Small*, 25 Maine, 455).

§ 603. Where personal property is wrongfully seized by an officer, a slight circumstance will sometimes raise a presumption that the seizure was made by direction of the party for whom the officer acted. An attorney indorsed a writ of *fi. fa.* as follows: "The defendant resides at W., and is an innkeeper." L. (defendant in that suit) resided at W. and conducted the business of A., who was his mother-in-law, and kept an inn there, and the goods on the premises were her property. The sheriff having seized A.'s goods at the inn, under the *fi. fa.*, it was held, that there was evidence to go to the jury that the attorney directed the sheriff to seize the goods, and to make him liable in trespass.¹ In the following case, the circumstance relied upon was deemed insufficient: Two attorneys issued a precept on a judgment recovered in a local court to the bailiff, and indorsed their names on it. They knew the residence of the defendant, and one of them sent him word that the levy would not be made on a particular day. The bailiff, while executing the levy, stated that he was employed by the attorneys. The defendant's house being without the jurisdiction, he brought an action against the bailiff and the attorneys, who severed in their pleas, and pleaded the general issue and a justification under the process. It was held, that there was not sufficient evidence to show that the attorneys authorized the illegal execution of the writ, independently of the special plea, and therefore that they were entitled to a verdict of acquittal on the general issue.²

§ 604. The fact that a person has caused goods to be attached will not estop him from showing that the goods were at the time in reality his property. In an action of trespass for taking and carrying away a certain wagon, it appeared that the defendant kept the wagon ten days, when the plaintiff caused it to be attached, and that the officer, upon attaching it, delivered it to the hired man of the

¹ Bowles v. Senior, 15 L. J. N. S. 231; 10 Jur. 354.

² Sowell v. Champion, 2 Nev. & P. 627; 6 Ad. & E. 407.

plaintiff, who placed it under the plaintiff's shed, where it had ever since remained. It was held, that the wagon was not to be deemed, as matter of law, to have been transferred to the plaintiff at the time it was attached and placed under his shed; and that the plaintiff, by causing the wagon to be attached, was not estopped from claiming that he had title to it when it was taken from his possession by the defendant.¹ * So, likewise, a person by attaching goods as the property of another, will not be estopped from proving that they belong to a third party.² In an action of trespass against an officer for taking and carrying away certain goods, it was objected that the goods were taken by the defendant by virtue of a writ against the plaintiff, and were attached as his property, and therefore that the defendant was estopped to deny that they were the plaintiff's property. But it was held otherwise. For if the attachment was made by mistake, supposing the goods to be the plaintiff's property when they were not, there could be no reason why the plaintiff should be entitled to an action for taking property to which he had no title.³

§ 605. It is of the essence of an estoppel *in pais* that the party claiming the benefit of the estoppel relied on the declarations of the other party as true, and was thereby induced

¹ Lewis v. Morse, 20 Conn. 211.

² Loomis v. Green, 7 Maine, 386.

³ Roberts v. Wentworth, 5 Cush. 192.

* In this case the court said: "The effect of the attachment was not to restore the property to the plaintiff, or estop him from asserting his previous ownership. By the attachment, the wagon was taken into the custody of the law, and upon the termination of the suit it would be the duty of the officer to treat it as any other property of the defendant seized under the same process. The defendant might at any time regain possession of the wagon by a writ of replevin; and so long as it was holden under the attachment it is immaterial in what place it is kept by the officer. The mere circumstance that it was placed for safe keeping upon the plaintiff's premises makes no difference, as it was still in the custody of the law. Had it appeared that the plaintiff, availing himself of the situation of the property, had resumed his possession, the defendant might have waived his title and shown, in mitigation of damages, that the property had gone back into the plaintiff's possession. But that does not appear to have been done. Had the property been in fact restored to the plaintiff, the proper damages would have been those occasioned by the taking and detention merely. But as there was no evidence of any such restoration of the property, we see not why the plaintiff is not entitled to a verdict for its value."

to act differently from what he otherwise would ; so that he will be prejudiced by the other party's being permitted to prove the fact different from what he has declared it to be. Therefore, in an action of trespass for taking a cow, it was held, that the plaintiff was not estopped by his admission to the attorney of the attaching creditor, subsequent to the attachment and before the sale, that the plaintiff owned the cow, because such attachment and taking were not made on the faith of the admission.¹ So, likewise, in an action of trespass against a deputy sheriff for seizing property under an attachment which was not sustained, it was held, that the plaintiff was not estopped to show that he owned the property, although at the time of the attachment he was in embarrassed circumstances, and stated on several occasions that no part of the property belonged to him, such declarations not having affected either party. If the declarations of the plaintiff had been acted on, it would have been different. But the case showed that the admissions, although made with a view to influence the conduct of the defendant, did not in fact influence it.²

13. *Evidence in justification.*

§ 606. The taking being proved, it is for the defendant to justify an act which *prima facie* is a trespass. When the answer in effect admits property in the plaintiff and a taking by the defendant, the case is *prima facie* for the plaintiff, and entitles him to a verdict unless the defendant proves a justification. If the defendant allege authority as an officer to seize the property in controversy, it is a defense in the nature of an avoidance of the plaintiff's claim for damages. The whole issue is then on the justification set up in the answer, and it is incumbent on the defendant to go forward and establish his defense.³ Woodbridge v. Conner⁴ was an

¹ Robinson v. Hawkias, 38 Vt. 693.

² Wallis v. Truesdell, 6 Pick. 455.

³ Kent v. Willey, 11 Gray, 368; 1 Greenlf. Ev. 625, 629.

⁴ 49 Maine, 353.

action of trespass for seizing and selling a wagon of the plaintiff. A witness called by the plaintiff testified that having tax bills and a warrant in his hands, the defendant informed witness that the plaintiff had said he would not pay his tax, and that the defendant then directed the witness if the plaintiff would not pay the tax to seize the property. There was no proof that the witness was a collector of taxes. What taxes were assessed, or what warrant for their collection was issued, did not appear. The judge remarked that as the defendant, if he had a justification, had studiously avoided disclosing it, it was not for the court to presume its existence. So, where an action was brought by the assignees of an insolvent debtor against an officer for taking and carrying away personal property of the debtor in their possession under an attachment issued against the debtor in favor of A. and others, the defendant offered to prove that the assignment to the plaintiffs was fraudulent and void as to creditors; it was held that it was incumbent upon the defendant to prove that A. and others were creditors of the debtor, and that the property was seized upon legal proceedings brought by them.¹

§ 607. If the trespass be justified under civil or criminal process, the defendant must prove every material fact of the authority under which he justifies.² Accordingly, where in an action of trespass the plaintiff called one of the defendants, who testified to the taking, and that it was done under a road warrant, it was held that this statement constituted no defense, but that the warrant itself should have been produced.³ When goods taken by an officer are claimed by a person who was not a party to the suit, and the latter brings trespass, and his title is contested on the ground of fraud, a judgment must be shown if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that the officer acted for a cred-

¹ Cross v. Phelps, 16 Barb. 502.

² Batchelder v. Currier, 45 N. Hamp. 460.

³ Mericle v. Mulks, 1 Wis. 366.

itor that he can question the title of the vendee.¹ * But if the court is satisfied that there was a fraudulent transfer of the property of the plaintiff, and that consequently he had no right of action, it will not grant a new trial after verdict for the defendant, though the record of the judgment was not given in evidence.² Where the defendant justifies under the judgment and execution of a justice of the peace, he must prove that such person is a justice.³ But it seems to have been doubted whether, in an action of trespass against an officer for taking the property of the plaintiff under an attachment issued by a justice of the peace against another person, it is necessary for the defendant to prove the preliminary proceedings in order to show the jurisdiction of the justice and the regularity of the attachment.⁴ †

¹ Bac. Abr. Trespass, G, 1; Bull. N. P. 91, 234; Martyn v. Podger, 5 Burr. 2631; Lake v. Billers, 1 Ld. Raym. 733; Ackworth v. Kempe, Doug. 41; Savage v. Smith, 2 W. Bl. 1104; Damon v. Bryant, 2 Pick. 411; Parker v. Walrod, 16 Wend. 514; affg. s. c. 13 Ib. 296; Simpson v. Watrus, 3 Hill. 619; Gelhaar v. Ross, 1 Hilton, 117; Candee v. Lord, 2 Comst. 269; Hall v. Stryker, 27 N. Y. 596; Cook v. Miller, 11 Ill. 610; Sexey v. Adkinson, 34 Cal. 346.

² High v. Wilson, 2 Johns. 46. See Dixon v. Watkins, 4 Eng. Ark. 139.

³ Hunter v. Harris, 4 Blackf. 126.

⁴ Parker v. Walrod, *supra*.

* The judgment is the best evidence of the relation of creditor and debtor, and no other evidence in such a case will be received. Upon the production of such evidence, the sheriff, as defendant, or any one having a right to avail himself of the judgment and execution, may raise and litigate the question of fraudulent sale by the judgment debtor to the plaintiff. The judgment establishes conclusively the relation of creditor and debtor, and all are bound by it. But in an action against a sheriff for wrongfully seizing goods by virtue of an attachment, the defendant may prove, even before judgment in attachment, that the sale of the goods to the plaintiff was fraudulent and void as against the attaching creditors (Rinchev v. Stryker, 31 N. Y. R. 140). In Thayer v. Willet, 5 Bosw. 844, it was held that a sheriff acting under a warrant of attachment issued as a provisional remedy, under the Code before judgment, who has seized property in the possession of a vendee claiming title under a bill of sale from the defendant in the attachment, may show, in defense of an action against him by such vendee to recover the property, that the alleged sale was fraudulent as against the attaching creditor. And see to the same effect Skinner v. Oettinger, 14 Abb. 109; Patterson v. Perry, 10 Ib. 82; Belmont v. Lane, 22 How. Pr. R. 365; Kelly v. Breusing, 33 Barb. 123.

† Where in trespass for taking the plaintiff's goods, not guilty is pleaded, and the plaintiff proves that the defendant, an attorney, delivered a *fi. fa.* to the sheriff, who thereupon took the goods, whether the defendant may give in evidence a judgment on which the *fi. fa.* issued, *quare* (Rundle v. Little, 6 Q. B. 174).

The validity of an execution under a *fi. fa.* cannot be impeached at *nisi prius*, on the ground that the judgment ought to have been revived by *scire facias*, or that there was an irregularity in the return of the writ (Habberton v. Wakefield, 4 Camp. 58).

§ 608. The officer cannot prove by parol that he had a legal warrant, or that he served it as directed by the statute, but must show by his return what he did under it in order that the court may see whether or not his acts are justified.¹ In *Purrington v. Loring*,² which was an action of trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that he took the goods as deputy sheriff under warrants of distress against the plaintiff. An objection to the defendant's justification was, that it appeared from his return upon the warrants of distress on which the chattels were seized, that he sold them after having advertised the time and place of sale twenty-four hours. As by the statute it was the duty of the defendant to advertise four days before the sale, it was admitted that the objection was fatal unless the defendant could be admitted to prove by parol, notwithstanding his return, that he in fact advertised the time and place four days before the sale. But it was held that parol evidence for this purpose was not admissible.*

§ 609. As the law makes the sheriff a certifying officer of his own doings upon precepts which are put into his hands for service, his return is evidence of such official acts as are required by the writ to be performed, but not of facts to excuse their non-performance. In relation to the latter, it is simply *prima facie* evidence and may be disproved.³ In

¹ *Williams v. Ives*, 25 Conn. 568.

² 7 Mass. 388.

³ *Browning v. Hanford*, 5 Denio, 586; reversing s. c. 7 Hill, 120; s. c. 5 Hill, 588; *Hathaway v. Goodrich*, 5 Vt. 65; *Stanton v. Hodges*, 6 Ib. 64; *Gyfford v. Woodgate*, 11 East, 297.

* In *Purrington v. Loring*, *supra*, the court said: "The officer's return must be in writing, and when made upon his precept and regularly returned, it must be presumed to be true until the falsity of it be proved. He cannot therefore justify by a parol return when it is his duty to return his doings in writing. And it may be further observed, that the owner of the goods taken has no regular means of knowing whether the officer has done his duty other than by inspecting his return, and if the return may be explained, or another return proved by parol, this means may be useless. And it may be added, that if parol evidence was admissible there would be great danger of fraud and perjury. But the officer by doing his duty in returning truly his proceedings indorsed on his precept is liable to no inconvenience if he has acted legally, and if he has not, he ought not to be protected by a false return, whether in writing or by parol."

Where defects in process, or in the return of an officer, are merely formal, they must be objected to by plea in abatement, or they will be cured (*Kelly v. Paris*, 10 Vt. 261).

an action of trespass against an officer for taking and carrying away a wagon, the defendant justified under a writ of attachment, and the plaintiff claimed that the attachment was served on Sunday and therefore illegal. It was, however, held that the officer's return that the attachment was served on Saturday was conclusive.¹ *Marble v. Keyes*² was an action against an officer for attaching and holding the plaintiff's goods under a writ against one Bailey, who had the custody of the goods. The plaintiff proved that the goods were attached as the property of Bailey, and a keeper placed over them. He also introduced in evidence the writ against Bailey, with the return of the officer thereon that he had attached the goods, and pursuant to an application by the plaintiff in the writ had caused the property to be appraised and sold. The defendant objected that this evidence was not sufficient to prove a taking upon which to maintain the action. But it was held otherwise.

§ 610. Between the parties and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, as bail and indorsers, the return of the officer of matters material to be returned, cannot be contradicted for the purpose of invalidating the officer's proceedings or defeating any right acquired under them.³*

¹ *Brown v. Davis*, 9 N. Hamp. 76.

² 9 Gray, 219.

³ *Messer v. Bailey*, 31 N. Hamp. 18; *Johnson v. Stone*, 40 Ib. 197.

* Where a warrant is returned, to have been posted at a house of public worship, it will be *prima facie* taken to be a public place, and the party who objects that from the character of the town or of the house, it is not properly to be so considered, is bound to show the grounds of his objection (*Scammon v. Scammon*, 8 Fost. 419).

Stanton v. Hodges, 6 Vt. 64, was an action of trespass for taking hay and grain, which the plaintiff as deputy sheriff, having attached on a writ against the defendant, had left in the possession of the defendant, and which the latter, after such attachment, had taken and used. The plaintiff's return showed an attachment of all the hay and grain in the defendant's barn. The defendant proved that he had a new barn containing hay and grain, and an old barn containing hay only; and he insisted that the return was void for uncertainty, and that therefore the plaintiff could not recover. *Collamer, J.*: "The return contains no patent ambiguity, and was therefore not void. If any ambiguity was created by the proof put in by the defendant, it was latent, and subject to explanation by proof, and to be made a question to the jury. But the proof did not produce even a latent ambiguity. The attachment was of hay and grain in the same barn; and proving that the defendant had another barn containing hay only, no

§ 611. The return of an officer that he had attached personal property, does not necessarily imply that he took the property so as to make him a trespasser, if the attachment should fail. Cases may be supposed in which evidence to disprove such an inference might be admissible. If, for instance, an attachment were returned at the request of the owner of the property, in order to give a preference to a favored creditor, the officer could not be charged as a trespasser; for *volenti non fit injuria*. So, if an officer returns an attachment without removing the property, leaving it in the possession of the debtor at his request, the attachment may be good for some purposes, as it would render him liable to the creditor, and would authorize him afterward to take possession of the property. Evidence therefore to

more created ambiguity, than proving that he had another barn containing neither hay nor grain. The identity related to the hay and grain; not to the barns."

In *Putnam v. Man*, 3 Wend. 202, the question arose whether where a constable serves a summons in his own favor, issued by a justice of the peace, the return made by the constable upon the summons could be impeached in an action of trespass. The Supreme Court in deciding in the negative, said: "I am inclined to think the constable's return upon the summons was not traversable in this action. The return, though false, gave the justice jurisdiction of the person of the defendant; for the act provides that the constable serving the summons shall, upon the oath of his office, return thereupon the time and manner of executing the same, and sign his name thereto; and in case the defendant does not appear at the time and place appointed in such summons, and it shall appear by the return, indorsed thereon, that the summons was personally served, the justice shall then proceed. The return of the constable is the evidence upon which the statute authorizes and requires the justice to proceed. He must therefore obtain jurisdiction of the defendant's person by virtue of the return; and the judgment which may be subsequently rendered will protect the magistrate, the party and the officer who may be instrumental in enforcing it. The constable's return is conclusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return. That the individual who made the false return was the plaintiff in the suit, cannot, that I perceive, alter the case. The party injured has a perfect remedy by an action for the false return; or if the defendant acted wilfully and corruptly, he might probably be punished criminally, on an indictment for a misdemeanor" (citing *Wheeler v. Lampman*, 14 Johns. 481).

That a plaintiff, being a constable, can legally serve a summons in his own favor, was decided in *Tuttle v. Hunt*, 2 Cowen, 436, where it was held that a plaintiff in a justice's court might serve his own summons, either where he was himself a constable, or was specially deputed for the purpose, in analogy to the case of a *capias* where no bail is required, which may be served by the sheriff when he is plaintiff, or by any other plaintiff, by special deputation (s. p. *Putnam v. Man*, 3 Wend. 202; and see *Bennet v. Fuller*, 4 Johns. 486).

show that in fact the officer did not remove the property, would not necessarily contradict the return.¹

§ 612. Where the statute does not direct that the officer shall make a return, such return will not be legal evidence in his behalf. What credit is to be given to the certificate of an officer who is not required by law to certify his doings, was considered by the Supreme Court of New Hampshire in *Davis v. Clements*.² In that case, the plaintiff brought an action of trespass against the defendant for taking the plaintiff's cattle. The defendant pleaded in bar, that he was surveyor of highways, and took the cattle as a distress for non-payment of highway taxes. The plaintiff replied that the defendant of his own wrong, &c., took the cattle. It was proved on the trial, that the defendant was duly chosen surveyor of highways, and had in his hands for collection highway taxes against the plaintiff, and a warrant to collect the same; and in order to show that his proceedings in distraining the cattle were regular, he offered in evidence a certified return of his doings indorsed on the warrant. It was held, that as the law had not made it the duty of a surveyor of highways to make a return, it was no better evidence for him than his own confessions and declarations would have been, and was therefore clearly incompetent. And a similar decision was made in an early case in Vermont, in relation to the certificate of a collector of taxes.³

§ 613. If there be a plea of duress, the defendant must prove that he had no reasonable means of escaping from the force or fear after they were applied to him, and before the goods were taken away.⁴ Accordingly, where in an action of trespass for taking the plaintiff's horse, the defendants, who were soldiers in the service of the late Confederate States, pleaded that it was done by command of officers in the Confederate Army, it was held that in order to amount

¹ *Boynton v. Willard*, 10 Pick. 166.

² 2 N. Hamp. 390.

³ *Hathaway v. Goodrich*, 5 Vt. 65.

⁴ *Cunningham v. Pitzer*, 2 W. Va. 264.

to a justification, the orders, and the circumstances by which the defendants were surrounded, must be shown to have amounted to compulsion.¹ *

§ 614. Care must be taken that the evidence in justification conforms to the plea. In trespass for taking goods, the defendants pleaded that W. L. was possessed of a room, and that they, as his servants, removed the goods which were encumbering the room to a convenient distance. It was held that this plea was disproved, by showing that the defendants locked up the goods in a room and took away the key.² † But a substantial correspondence between the allegations of the plea and the evidence will be sufficient. A. being indebted to B., it was agreed that B. should keep A.'s cow until the debt was paid; that A. might drive her away every morning and night to be milked, and if he did not return her that B. might retake her whenever or wherever he found her. A. drove her away, and kept her three weeks, whereupon B. retook her. In trespass by A. against B., for so doing, it was held that these facts supported a plea deny-

¹ Witherspoon v. Woody, 4 Cold. Tenn. 605.

² Jones v. Lewis, 7 Car. & P. 343.

* The civil law set aside a contract procured by force or fear or want of liberty in regard to it. Digest, Lib. 4, Tit. 2, § 1. It was said however, that the party must be intimidated by the apprehension of some serious evil of a present or pressing nature, and such as is capable of making an impression upon a person of courage. But Pothier thinks this rule too strict, and that "regard should be had to the age, sex, and condition of the parties," and that "a fear which would not be deemed sufficient to have influenced a man in the prime of life and of a military character, might be sufficient in respect to a woman or a man in the decline of life" (Pothier on Obligations, by Evans, p. 16, art. 3, §§ 2, 25).

Courts of equity, which derive their principles in a large degree from the civil law, relieve a party when he does an act or makes a contract, when he is under the influence of extreme terror, or of apprehension short of duress; for in cases of this sort he has no free will, but stands *in vinculis*. Circumstances of extreme necessity or distress of a party, although not accompanied by any direct duress or restraint, may also overcome free agency, and justify the court in setting aside the contract on account of some attending oppression, fraudulent advantage or imposition (2 Story's Eq. § 239; and see Whelan v. Whelan, 3 Cowen, 537; Sears v. Shafer, 1 Barb. 408; s. c. 2 Seld. 268; Howell v. Ransom, 11 Paige, 538; Ellis v. Messervie, Ib. 467).

† Upon a new assignment of excessive damage to a justification, the evidence on the part of the plaintiff must establish a clear excess and unnecessary injury (Hockless v. Mitchell, 4 Esp. 86).

ing A.'s property in the cow.¹ So, likewise, the defendant may show under the general issue that the goods were taken as a distress for rent.² *

§ 615. Although the plea justifies the taking of all of the goods specified in the declaration, yet the defendant is not required to disprove the taking of such as are omitted from the evidence by the plaintiff. In an action for entering a store and carrying away the plaintiff's goods, the defendant pleaded that the goods belonged to other persons, and that he levied on them under executions against such persons. At the trial, the plea was supported, except as to some of the articles specified in the declaration, as to which there was no proof of the value, ownership, or taking. It was held that the defendant was entitled to a verdict, and that it was not error in the court to refuse to charge the jury that, as to the value of the excepted articles, they must find for the plaintiff.³

14. *Evidence in mitigation of damages.*

§ 616. The defendant may show in mitigation of damages, that the property did not belong to the plaintiff, and that it has been applied for the benefit of the owner;⁴ † or

¹ Richards v. Symons, 15 L. J. N. S. 35; 10 Jur. 6.

² Reed v. Stoney, 2 Rich. 401.

³ Emanuel v. Cocke, 6 Dana, 212; Lovier v. Gilpin, Ib. 321.

⁴ Squire v. Hollenbeck, 9 Pick. 551; Pierce v. Benjamin, 14 Ib. 356.

* In an action of trespass, for taking goods in execution under a judgment which has been set aside for irregularity, evidence is not admissible under the plea of not guilty to show that since the commencement of the action the proceeds of the execution have been paid over to the plaintiff (Rundle v. Little, 13 L. J. N. S. 311; 8 Jur. 668; 6 Q. B. 174).

† Squire v. Hollenbeck, *supra*, was an action of trespass for taking the plaintiff's horse. The defendant offered to prove on the trial that the horse belonged to one Crippen, and was taken from the plaintiff and sold under an attachment issued in favor of a creditor of Crippen, and the proceeds applied to the payment of Crippen's debt. The Supreme Court, in granting a new trial on account of the rejection of this evidence, said: "It is clear that it is not competent to a defendant in trespass for the taking of goods, to plead property in a stranger, and upon sound principle, for the trespass may be an injury to the possession. The question to be considered is, whether if the property comes to the use of the owner, evidence of that fact may not be received in mitigation of damages; and we all think it may be. The reason why a party having possession should maintain trespass is, that he may have sustained injury by being

in case of improper seizure of goods on execution, that without any agency on the part of the officer, the goods in question have been applied to the payment of the plaintiff's debt due to a third person;¹* or that the goods have been retaken by the owner.² Where in an action by one of two partners to recover his interest in property taken wrongfully on an execution against the firm, the other partner refusing to be made a plaintiff, was joined as a defendant, it was held that a retaking of the goods, either before or after the commencement of the action by the defendant partner, was in legal effect a retaking on the joint account of himself and the plaintiff, and to that extent would reduce the damages.³

§ 617. Where goods are tortiously taken, and before suit brought there is a sale on legal process against the owner in favor of some person other than the wrong-doer, such second taking will be received in mitigation of damages in an action by the owner against the tortfeasor, if the latter took the goods believing that he had a title to them.⁴ In *Kaley v. Shed*,⁵ which

deprived of the goods; nor should his claim to damages be construed strictly. Ordinarily he is either the owner or answerable over to the owner; and in either case he is entitled not only to damages for the taking, but also for the value of the goods. Possession is *prima facie* evidence of title, and unless the contrary is shown, it is sufficient to entitle the plaintiff to recover for the value. But here, if the allegation of the defendant can be made out by proof, the plaintiff is not answerable over. The real damage then sustained by him arises from the injury to his special property, and he ought not to recover for the value of the mare. The evidence which was rejected ought to be received, and the burden will rest on the defendant to prove satisfactorily the fact alleged, in order to justify a reduction of the damages."

Where in an action of trespass against a justice of the peace for attaching personal property without the proof required by law; the property is restored to the owner before the commencement of the suit. Such restoration, although it cannot be pleaded in bar, must be received in mitigation of damages; otherwise the plaintiff would recover for an injury which he had not sustained (*Vosburgh v. Welch*, 11 Johns. 175; see 4 Denio, 120).

¹ *Sherry v. Schuyler*, 2 Hill, 204; *Wehle v. Haviland*, 42 How. Pr. R. 399.

² *Wehle agst. Butler*, 43 How. Pr. R. 5.

³ *Nightingale v. Scannell*, 18 Cal. 315.

⁴ *Higgins v. Whitney*, 24 Wend. 379; *Otis v. Jones*, 21 Ib. 394.

⁵ 10 Metc. 317.

* *Irish v. Cloyes*, 8 Vt. 30, was an action of trover, and the evidence of a conversion consisted in a demand and refusal. Subsequently to the demand, the chattels were seized by a third person, a collector of taxes, and were regularly disposed of, to satisfy a tax. The plaintiff having thus received the benefit of the property, in satisfaction of his own debt, the court held him entitled to nominal damages only.

was an action of trespass against a constable, it appeared that the goods were taken from the plaintiff's house by the defendant, whilst in the execution of a search warrant; but not being the goods specified in the warrant, the taking was a trespass. The plaintiff had demanded the goods, and whilst the defendant was preparing to return them, they were attached as the property of the plaintiff by another officer. It was held that the property being in the custody of the law by legal process, which the defendant could not resist or control, and going to the plaintiff's benefit as much as if it had been returned, such application operated to the same extent in mitigation of damages. In New Jersey, it has been held that when it appears that the goods have been attached or taken in execution in the hands of the wrong-doer, upon process issued against the owner, and that they have been applied in satisfaction of the owner's debt, or otherwise for his benefit, this may be shown in mitigation of damages, whether the process be sued out by the trespasser or by a third party.¹ In Massachusetts, an action of trespass was brought against a sheriff for taking and carrying away dry goods, by virtue of an attachment in favor of the creditor of the owner of the goods. The latter had mortgaged the goods to the plaintiff, the plaintiff taking them into his possession. A question arose whether the defendant could show, in mitigation of damages, that the property thus wrongfully taken by him from the possession of the plaintiff was liable to be sequestered for the debts of the mortgagor, upon the ground of its having been transferred to the plaintiff in violation of the provisions of the bankrupt law, and had in fact been thus sequestered, and that he had, as assignee, under the decree of the District Court to that effect, accounted for the avails thereof as a part of the assets of the bankrupt, to be distributed among his creditors. The plaintiff insisted that if the defendant was a wrong-doer in the original taking of the property, he must be charged with the whole value of it;

¹ *Hopple v. Higbee*, 3 Zab. 342; but see *McMichael v. Mason*, 13 Penn. St. R. 214.

and this irrespective of the proceedings in bankruptcy, and of the fact that he had been required to account therefor as assignee. It was, however, held that the plaintiff could only recover nominal damages.¹*

15. *Objections to evidence, when to be made.*

§ 618. Objections to the admissibility of evidence must be made at the trial. In an action for wrongfully taking trees and converting them into shingles, the defendants allowed the plaintiff to give all his evidence in regard to the value of the shingles, and raised no objection at the trial that the plaintiff was not entitled to recover full damages because of any omission or defect in the complaint. It was held that the objection taken on appeal, that the complaint was not for the shingles but for the timber in its original state, came too late.² Where, in an action of trespass for taking a quantity of hay, the defendant claimed under a chattel mortgage which had been filed in the town clerk's office, but it was not proved where the mortgagor resided when the mortgage was executed, it was held that the plaintiff was entitled to recover, the mortgage being void for want of proof that it was filed in the proper clerk's office. This decision, however, was afterward overruled by the New York Court of Appeals, on the ground that it did not appear that the foregoing objection was made on the trial.³

¹ Perry v. Chandler, 2 Cush. 237.

² Rice v. Hollenbeck, 19 Barb. 664.

³ Smith v. Jenks, 1 Denio, 580.

* In this case the court said: "It is no doubt true that possession of personal property is sufficient to entitle a party to maintain trespass against the wrongdoer, and to recover the whole value of the property; and that it would constitute no legal defense, either to the action or to the damages, to show merely an outstanding title in a third person, or that the plaintiff had a special property in the articles whilst the general property was in another. Some of the cases cited by the counsel for the plaintiff seem to go much further, and to hold that in a case where the original taking was unlawful, the plaintiff would be entitled to recover the full value of the property taken, and that evidence of the appropriation of the proceeds of the property to the use of the plaintiff, or a surrender of it, or of its proceeds, to other persons having a legal title thereto, would not be competent in mitigation of damages. We think a different rule has been adopted in Massachusetts" (citing *Hanmer v. Wilsey*, 17 Wend. 91; *Pierce v. Benjamin*, 14 Pick. 356; *Kaley v. Shed*, 10 Metc. 317; *Squire v. Hollenbeck*, 9 Pick. 551).

16. *Damages in general.*

§ 619. The jury may take into consideration the circumstances which accompanied and gave character to the wrong, and give damages for whatever injury the evidence shows necessarily resulted from the wrongful act;^{1*} and the plaintiff cannot be deprived of them by any mere act of the wrongdoer—as by an unaccepted offer to return the property, or causing it to be subsequently taken on legal process against the owner.² In an action of trespass against two creditors and an officer for attaching the property of the debtor, it appeared that the officer delivered the property attached to a receiptor, and that the plaintiff, after commencing his action of trespass, assigned his claim therein to the receiptor; and that judgment having afterward been rendered and execution issued in the suit in which the property was attached, the officer demanded the property of the receiptor who refused to redeliver the same. It was held that such refusal on the part of the receiptor could not go in mitigation of damages, the defendants not having offered to surrender to him his receipt or discharge him from his liability thereon.³ Where it was proved that the plaintiff having purchased goods of the defendant on credit, secretly absconded with them, and that the defendant followed him and forcibly retook the goods, it was held that the measure of damages was the value of the goods, and that the defendant could not consider the debt due from the plaintiff to him, or treat it as reduced by the taking.^{4†}

¹ Young v. Mertens, 27 Md. 114; Baltimore &c. R. R. Co. v. Blocher, Ib. 277; *ante*, § 598.

² Higgins v. Whitney, 24 Wend. 379; Hanmer v. Wilsey, 17 Ib. 91; Otis v. Jones, 21 Ib. 394; Rogers v. Fales, 5 Penn. St. R. 154; Wooley v. Carter, 2 Halst. 85; Johnson v. Parker, 1 N. & M. 1; Denison v. Hyde, 6 Conn. 507; Burrows v. Stoddard, 3 Ib. 431; see *ante*, § 617, *post*, § 622.

³ Ellis v. Howard, 17 Vt. 330.

⁴ Gillard v. Brittan, 1 Dowl. N. S. 424; 8 Mees. & W. 575; and see Knight v. Herrin, 48 Maine, 533.

* Where, in an action of trespass *de bonis asportatis*, the defendant suffers a default, the plaintiff is entitled to nominal damages only, unless he establishes a claim to a larger sum (Rose v. Gallup, 33 Conn. 388).

† In an action of trespass against an officer for levying on and selling the

§ 620. Where the action is for the fraudulent, malicious, or wilful taking of goods, the amount of damages is in the discretion of the jury.¹* But, ordinarily, for the mere taking of goods, a verdict for the plaintiff should be for the value of the property taken at the time of the taking, with interest.² Goods having been sold, were seized by the sheriff, in transit, under an attachment against the seller, and judgment by default entered thereon. An action was brought by the owner of the goods against the sheriff for the seizure; and subsequently, as the property was perishable, the parties agreed

plaintiff's goods, in disregard of his claim for the benefit of the exemption law, the debt cannot be defalked against the plaintiff's damages (Wilson v. McElroy, 32 Penn. St. R. 82).

In an action of trespass for attaching and selling trust property upon a writ against the trustee personally, the judgment in the attachment suit cannot be deducted from the value of the property sued for, on the ground that the demand for which judgment was recovered, was for property bought by the trustee for the benefit of the trust, and appropriated to the use of the *cestui que trust*, unless there was mistake or fraud in obtaining it on the personal credit of the trustee. Barber v. Chapin, 28 Vt. 413, was an action of trespass against a deputy sheriff for attaching and selling certain personal property held in trust by the plaintiff, on a writ in favor of Townsley & Son, against the plaintiff. At the trial, in the court below, the defendant offered to prove, under the general issue, that the property attached by Townsley & Son, and for which they recovered judgment against the present plaintiff, was property bought for the benefit of the trust fund, and applied to the use and benefit of the *cestui que trust*; and he claimed the right to have the said judgment deducted, by way of recoupment, from the value of the property sued for in the present action. But it was held that the evidence was not admissible, and judgment was rendered in favor of the plaintiff for the full value of the property. The Supreme Court, in affirming the judgment, said: "Had the plaintiff, by representing himself as the owner, or perhaps by having the possession and ostensible ownership of the property held in trust, gained a false credit with Townsley & Son; and, especially, had he done this purposely, and the property, obtained through this false credit, had gone to the use of the *cestui que trust*, it is very probable that a court of equity would have afforded some relief. But nothing of that kind was offered to be shown in the present case. Here, for anything apparent, the fact of the property being trust property was well known to Townsley & Son at the time the credit was given. And if it had not been known, it might not have been the fault of the *cestui que trust*, or even of the trustee. The credit then being given to the trustee personally, without fraud or mistake, we are unable to perceive any ground for deducting the amount of the credit from the judgment."

¹ Briscoe v. McElween, 43 Miss. 556; Jamison v. Moon, Ib. 598.

² Hopple v. Higbee, 3 Zab. 342; Walker v. Borland, 21 Mo. 289; Coolidge v. Choate, 11 Metc. 79; Felton v. Fuller, 35 N. Hamp. 226; Engle v. Jones, 51 Mo. 316. And see Franz v. Hilterbrand, 45 Ib. 121.

* In trespass to personal property under a pretended claim of right, and with a view to pecuniary gain only, the rule of damages is one of compensation merely, and not punitive; no matter how unfounded the claim may be, provided the act be not such as to imply malice (Lane v. Wilcox, 55 Barb. 615, per Foster, J.)

that an execution should issue upon the judgment in the attachment suit, and that the goods should be sold and the proceeds be paid into court to abide the result of the controversy. It was held that the owner of the goods was entitled to recover their full value, although he purchased them at such sale for less than they were worth.¹ In an action against the collector of customs for improperly seizing and detaining the plaintiff's ship, it was held that the measure of damages was the difference between the price for which the vessel would have sold at the time of her seizure, and the price she actually sold for at public auction directly after her restoration, together with the actual expenses incurred and the interest on the amount.²* Where an action was brought against an officer for levying upon the plaintiff's horse, under an execution against a third person, it was held that the measure of damages was the value of the horse to the plaintiff in his business.³

§ 621. It is obvious that the value of goods taken would

¹ Ely v. Schumacher, 29 Penn. St. R., 40.

² Woodham v. Gelston, 1 Johns. 134.

³ Farrel v. Colwell, 1 Vroom, 123.

* In Woodham v. Gelston, *supra*, the court said: "We are not now to settle a rule of damage which will be applicable in every action of trespass, but merely whether the one contended for by the plaintiff be proper under all the circumstances of this case. We think it is. It is seldom that the actual injury sustained in consequence of a tort can be ascertained with so much precision. Since it can be so estimated, and the party is willing to adhere to this measure of damage, there can be no reason to prevent his recovery to that extent. The data on which this estimate is formed are satisfactory, and leave less to an arbitrary discretion than any which have been proposed as substitutes. The difference between the price in the first and second sale, both being fair, though some credit was given in the first, and the actual expenses he has incurred, will, with the interest, amount to no more than an indemnity to the plaintiff for the injury resulting from the conduct of the defendant. To such an indemnity the defendant, who is admitted to be a trespasser, cannot reasonably object. The marshal's fees must now be presumed to have been properly paid; and if the defendant were liable for them, as was probably the case, since the property was restored, there can be no hardship in refunding them to the plaintiff. At any rate, it might have been shown to the jury, or stated in the case, that this was a mere voluntary payment, and then a deduction would have been proper. The interest has been objected to, because the jury were not obliged to allow it. If they had a discretion on this subject, it is sufficient. Two trifling charges for wharfage and ship keeping must be deducted, as they accrued after the restoration of the vessel. As the calculation now stands, the verdict includes a small sum as compound interest. We are of opinion that this must be deducted; without, however, intending to say that compound interest can never in any case be recovered."

not always furnish a correct standard of recompense.* A party, for instance, has upon his grounds a quantity of standing timber, which he wishes to preserve in the expectation that it may appreciate in value. It would hardly accord with the claims of justice to oblige him to accept from a trespasser, in an action brought to vindicate his rights, the price of the timber at such time as the trespasser might choose to take it.¹ Neither does the law recognize the interest as uniformly the exact measure of damages;² but the owner of the goods may prove the value of the use during the time he was deprived of them.³ And there is an exception to the rule when the property has been restored to the owner.⁴ When goods sold under illegal process are bid in for the owner by his agent, the measure of damages in an action of trespass is the amount of the bid and interest, and not the value of property sold.⁵ In case of a wrongful levy and sale, the measure of damages is the value of the property at the sale only where the purchaser has obtained the property; otherwise, the loss actually sustained is the measure.⁶ Where goods wrongfully attached are left by the officer with the owner, upon his giving a receipt for them, the latter, in an action brought by him against the officer, will be entitled to recover the value of the goods at the time of the attachment, but without interest for the time during which the owner has the use of them under the receipt.⁷ So, likewise, if an officer

¹ *Bucknam v. Nash*, 12 Maine, 474.

² *Longfellow v. Quimby*, 29 Maine, 196; s. c. 33 *Ib.* 457.

³ *Warfield v. Walter*, 11 *Gill & Johns*. 80.

⁴ *Hunt v. Haskell*, 24 Maine, 339; *Curtis v. Ward*, 20 Conn. 204; *Barry v. Bennett*, 7 Metc. 354; *Johnson v. Sumner*, 1 *Ib.* 172; *Weld v. Oliver*, 21 *Pick.* 559; *Kennedy v. Whitwell*, 4 *Ib.* 466; *Greenfield Bank v. Leavitt*, 17 *Ib.* 1; *Felton v. Fuller*, 35 *N. Hamp.* 226.

⁵ *Baker v. Freeman*, 9 *Wend.* 36.

⁶ *Warner v. Ostrander*, 44 *Ill.* 356.

⁷ *Robinson v. Mansfield*, 13 *Pick.* 139.

* In an action by a married woman for the wrongful taking and removal of her personal property, under an execution against her husband, it was held that the measure of damages was not the value of the goods seized, but only such damages, if any, as she had sustained by reason of the taking and detention of the goods, and the injurious consequences thereof, if any, from the date of the seizure until their restitution, unless the defendants acted after notice and wantonly, in which case she would be entitled to exemplary damages (*Strasburger v. Barber*, 38 *Md.* 103).

use goods which he has attached, the owner will be entitled to recover their value, unless he subsequently received back the property, or the same was legally disposed of for his benefit, in which case the officer will only be liable for the damages occasioned by the use.¹* Where, in an action for taking and carrying away goods, it appeared that the plaintiff, subsequent to the asportation, received railroad checks for the goods, which he handed to a third person, with instructions to take charge of the property, it was held a sufficient exercise of ownership over the goods by the plaintiff to be considered in mitigation of damages.²

§ 622. Where an action is brought by the mortgagee of personal property against an officer for taking part of it, under an attachment against the mortgagor, the defendant may show that the plaintiff has been paid, his claim out of the

¹ Collins v. Perkins, 31 Vt. 624; Yale v. Saunders, 16 Ib. 243; Stewart v. Martin, Ib. 397; Lamb v. Day, 8 Ib. 407.

² Dailey v. Crowley, 5 Lans. 301.

* In an action of trespass for taking a quantity of wood, it appeared that the land whereon the wood was cut was claimed adversely to the plaintiff; that the adverse claimant sold the wood in question to one Mann, who caused it to be cut, and after it was cut employed the defendant to remove it to another part of the same lot. It was held that, if the plaintiff could maintain the action, he was entitled to only such actual damages as were caused by the removal (Pratt v. Batfels, 28 Vt. 685). The court said: "We are satisfied that the defendant is not liable in this case for the value of the wood as it stood upon the land. It is not pretended that the defendant has used the wood or in any way converted it to his own use, or done any act in relation to it, but simply remove it from one place to another on the same premises. It was never removed from the farm on which it was cut, and, in fact, the wood was left by the defendant in the actual and constructive possession of the same person in whom it was before the removal was made. The plaintiff had the same constructive possession after the removal by the defendant that she had before; for it was left on the same premises to which she made her claim of title. The defendant, for that act, cannot be made liable for the value of the wood as it stood on the stump. The plaintiff can recover but nominal damages, or, at most, the actual damages sustained from the mere act of removal. If the defendant had removed the wood from the premises, and had taken the same into his exclusive possession, and an action of trespass or trover had been commenced against him, yet, if before judgment the property had been returned and placed upon the premises from which he had taken it, the rule of damages would be the same; the plaintiff could recover but nominal damages, or, at most, actual damages for the removal. The return of the property would mitigate the damages to that amount. The rule of damages in this case can be no greater than in that, for the injury sustained is no greater. The fact that this wood was left in the same lot in which it was taken, and consequently as much in the possession of the plaintiff as it was before its removal, should have the effect to reduce the plaintiff's claim to nominal damages, or such actual damages as were sustained from the act of removing it."

the property left in his possession.¹ And if goods wrongfully taken have afterward been legally sold on an execution against the claimant, such sale will take from the consideration of the jury all inquiry as to the value of the property, and confine them to such damages only as were actually sustained by the wrongful taking.² So, also, where an action of trespass is brought against an officer for attaching property out of his precinct, he may show, in reduction of damages, that having carried the property within his precinct, he attached it there, on the same process, after the commencement of the action of trespass against him.³*

§ 623. If goods deposited with a pawnbroker, as security for advances, are distrained, the measure of damages is the value of the goods, and not the plaintiff's interest in them.⁴ But where personal property mortgaged is left by agreement with the mortgagor, and before forfeiture is seized by the mortgagee, in an action of trespass by the mortgagor therefor, the measure of damages is not the value of the goods, but the value of the plaintiff's interest in them at the time of the trespass.⁵ So, likewise, when the action is brought by a bailee against the general owner, the plaintiff can recover the value of his special property only. If the suit be by the

¹ Ward v. Henry, 15 Wis. 239.

² Irish v. Cloyes, 8 Vt. 30; Clark v. Washburn, 9 Ib. 302; Squire v. Hollenbeck, 9 Pick. 551; Pierce v. Benjamin, 14 Ib. 356.

³ Stewart v. Martin, 16 Vt. 397. ⁴ Swire v. Leach, 18 C. B. N. S. 479.

⁵ Brierly v. Kendall, 17 Adol. & El. N. S. 937.

* Stewart v. Martin, *supra*, was an action of trespass against a constable for attaching cows and other property on a writ against one Corey; the plaintiff claiming to have previously bought the property of Corey. Williams, Ch. J., in delivering the opinion of the court, said: "The actual damages which the plaintiff sustained were no other than nominal. The damages for driving the cattle across the line between the towns of Arlington and Shaftsbury could be no other than nominal, when they were at all times liable to be taken by the creditors of Corey, and were so in fact taken by Huling, claiming to be a creditor. The plaintiff may consider herself fortunate in trying this question of the validity of the sale from Corey to her at the cost of the defendant, who has been subject to nominal damages in consequence of his going out of his precinct to serve the writ of Huling.

In an action of trespass against a sheriff for seizing goods in transit, the measure of damages is the value of the goods at the time at the place of consignment, less the charges of the carrier for delivering it there.

bailee against a stranger, the plaintiff is entitled to the value of the property and interest, according to the general rule, and holds the balance beyond his own claim, in trust for the general owner.¹ In a declaration in trespass, the plaintiff, who was an attorney, stated his damages specially, namely, that in consequence of the taking away of a promissory note from his office by the defendant, the plaintiff was prevented from prosecuting and collecting it, and was deprived of the profit of a suit for the collection thereof. The judge charged the jury, as a matter of law, that the plaintiff's actual damages, if they found for him, were the amount of the note, principal and interest, together with five dollars for retaining fee and issuing the declaration on the note. It was held, that this instruction was erroneous, the law not implying that the plaintiff had sustained any such damage.²

§ 624. Not only the direct damage, but the probable or inevitable damages which result from the aggravating circumstances attending the act, are proper to be estimated by the jury.³* In an action of trespass for the wrongful seizure

¹ Russell v. Butterfield, 21 Wend. 300; White v. Webb, 15 Conn. 302; Kennedy v. Whitwell, 4 Pick. 466; Spoor v. Holland, 8 Wend. 445; Brizsee v. Maybee, 21 Ib. 144.

² Dumont v. Smith, 4 Denio, 319.

³ Allred v. Bray, 41 Mo. 484.

* In *Suydam v. Jenkins*, 3 Sandf. 614, the court laid down the following rule for ascertaining the sum which the injured party ought to recover where personal property is wrongfully detained, whether by force, by fraud, or by process of law: "Setting aside the exceptional cases, in which exemplary damages may be justly claimed and given, and confining ourselves to those in which the remedy sought is simply pecuniary, the principles which, as it seems to us, are manifestly just and universal in their application, are, that the owner, to whom compensation is due, must be fully indemnified, and that the wrong-doer must not be permitted to derive any benefit or advantage whatever from his wrongful act. It may frequently happen that these principles, when applied, will coincide in the result; but there are many cases in which it will be seen that the application of both is necessary. The injured party must be indemnified. He must be placed in the same situation in which he would have been had the wrong not been committed, or it had been instantly repaired by the payment of the compensation then due. As the actual loss to the owner is the same, whatever may be the form of the action in which its reparation is sought, the sum due to him for its compensation must be the same whether he is the plaintiff in trespass or trover, or the defendant in replevin. There can be no variance in the amount of an indemnity, and if its criterion can be fixed, any departure from the standard which it establishes must be capricious and arbitrary. * * * * It will be ascertained in all cases by adding to the value of the property, when the owner is dispossessed, the damages which he is proved to have sustained from

and detention of the plaintiff's sloop, it was held, that the jury were at liberty to consider the expense which might arise in the recovery of the property, and damage for the forcible invasion of it, as well as for the injury the vessel had sustained.¹ *Edwards v. Beach*² was an action for forcibly taking, carrying away, and destroying the tavern sign of the plaintiff. On the question of damages, the court said: "The declaration charges a violation of the plaintiff's right of property and possession by force, and the abduction and destruction of property of a certain value. The value of the property, or the amount of the injury done to it, is not the only ground of damages. The plaintiff is entitled to recover for the force and injury, according to the nature and circumstances of the case, and the aggravations attending it, as well as for the value of the property taken. Were it otherwise, a person so disposed might forcibly dispossess another of any article of property at his pleasure, and compel the owner, however unwilling, to accept of the value in its stead." In an action of trespass for wrongfully executing a distress warrant, evidence of loss from the interruption of the plaintiff's business is admissible; and it may be shown that books of peculiar value, and files of papers indispensable to the plaintiff's business, but of little value to others, were unnecessarily or maliciously taken.³ In an action for wrongfully removing a fence, the plaintiff may recover not only for the damage done to the fence, but for the injury of his crops by cattle entering through the breach in the fence.⁴ In trespass for taking saw logs, with a general averment of damages, the jury were instructed that they might allow the plaintiff the profit he would have made by sawing the timber and by its appreciation in price.⁵ Where the defendant had wrongfully seized the plaintiff's goods, but had not removed them

the loss of its possession. * * * * But the amount of the judgment that ought to be rendered in his favor, even when no exemplary damages are claimed, is not necessarily to be limited to an indemnity."

¹ *Denison v. Hyde*, 6 Conn. 507.

² 3 Day, 447.

³ *Sherman v. Dutch*, 16 Ill. 283.

⁴ *Gray v. Waterman*, 40 Ill. 522.

⁵ *Bucknam v. Nash*, 12 Maine, 474.

from the house in which the plaintiff resided, and another wrong-doer, against the will of the defendant, seized the goods while thus in the defendant's possession, the plaintiff was held entitled, in an action of trespass, to recover as damages from the defendant the amount she had been compelled to pay to the second wrong-doer to redeem the goods from him.¹ A bailor is entitled to damages for time spent, and expenses incurred, in searching for property wrongfully taken from the possession of his bailee.² In Connecticut, where the defendant, an officer, had attached and removed the property of the plaintiff under a writ issued and placed in the officer's hands for service without authority, it was held, that the jury, in estimating the damages, might take into consideration the necessary expense of prosecuting the suit, over and above the taxed costs.³ But in a subsequent case, in the same State, it appearing that the defendant, who was a private party, had acted in good faith and with an honest intention, the plaintiff was not allowed the expenses of the litigation.⁴ * Where goods were taken on execution, under a warrant of attorney and judgment which were afterward set aside as illegal, the plaintiff was not allowed, as part of the damage, his costs incurred in vacating the warrant of attorney and judgment.⁵

¹ Keene v. Dilke, 18 L. J. Exch. 440.

² Heitzman v. Divil, 11 Penn. St. R. 264.

³ Williams v. Ives, 25 Conn. 568. See *ante*, § 394.

⁴ Dibble v. Morris, 26 Conn. 416.

⁵ Holloway v. Turner, 6 Q. B. 928.

* Dibble v. Morris, *supra*, was an action of trespass for the attachment and removal of a yoke of cattle belonging to the plaintiff. The defendant was a creditor of the assignor of the cattle, and seemed to have been honestly endeavoring to secure his debt by the attachment of the cattle which had belonged to his debtor, and were, in fact, in the debtor's hands at the time of the attachment under circumstances calculated to excite suspicions of the *bona fides* of the assignment. The judge before whom the cause was tried charged the jury that, "in addition to the value of the property taken by the defendant, and interest thereon, it would be proper for them to take into consideration the expenses necessarily attendant upon prosecuting his claim in court." The Supreme Court held, that had the jury been instructed that if they found the attachment wanton or malicious it would be proper for them to give the plaintiff the amount of his expenses in the litigation, in addition to the value of the property and interest thereon, the charge would have been unexceptionable, but that without that qualification it was wrong.

§ 625. If there is an abuse of authority by which the party becomes a trespasser *ab initio*, the plaintiff may recover damages as well for the part of the injury which would have been justified if there had been no abuse, as for that part which is directly caused by the abuse.¹ Where goods are seized under process upon a regular judgment, but in a place to which the process does not run, the owner may recover the whole value of the goods, and not merely the amount of the damage which he has sustained by their being taken in a wrong place.² So, likewise, if an officer sell property on execution at a place other than that named in the notice of sale, without adjourning to such place or obtaining the consent of the execution debtor, the measure of damages in an action of trespass therefor is the value of the property, although the officer has paid over the proceeds of the sale to the execution creditor.³ *

§ 626. It is plain that the trespasser ought not to derive a benefit from his wrongful act, and that he may be allowed to the extent of the value of the property taken, with interest, even when the amount exceeds the sum that would be sufficient to indemnify the owner. If goods uninsured should, by force or fraud, be removed from a warehouse, which immediately thereafter is consumed by fire, as they must have perished had they remained, it is certain that the owner sustains no loss from their removal; yet in an action against the wrong-doer that fact cannot be given in evidence to bar a recovery, nor can the recovery be for a less sum than the value of the goods when removed. So, if the goods when

¹ Kerbey v. Denby, 2 Gale, 31; 1 Mees. & W. 336.

² Sowell v. Champion, 6 Ad. & E. 407; 2 Nev. & P. 627.

³ Hall v. Ray, 40 Vt. 576. But see Briggs v. Gleason, 29 Ib. 78, *contra*.

* In Hall v. Ray, *supra*, it was claimed by the defendant that as the proceeds of the sale were applied on the execution, and the judgment debt was thereby *pro tanto* satisfied, the damages should be diminished to the same extent. The difficulty in the way of adopting that view arose from the fact that the sale was illegal. The defendant had no authority to sell and apply the property in the manner he did. In order to entitle him to apply the property in payment of that judgment, it was necessary for him to make a legal sale of it. He was not the plaintiff's agent. He was the agent and officer of the law proceeding *in invitum* against the plaintiff's right to hold and dispose of his own.

wrongfully taken were contracted to be sold at a less price than their market value, the owner would be fully indemnified by giving him the sum, with interest, which he would have realized had he retained the possession; yet it cannot be doubted that the market value when the right of action accrued, with interest from that time, should be the measure of damages.¹*

§ 627. Remote or speculative losses should not be considered in estimating the damages. In *Boyd v. Brown*,² which was an action of trespass against an officer for wrongfully attaching a vessel belonging to the plaintiff, the judge instructed the jury that they were to estimate the damages according to the value of the vessel at the time of taking, "and the additional damages sustained, if any." It was held that this remark did not justify the jury in assessing damages for the breaking up of the voyage, and a verdict having been found for the plaintiff for \$1,075 67, it was held excessive, and a new trial granted on that ground. In an action for taking corn, the plaintiff, in order to enhance the damages, will not be allowed to prove that by reason of the trespass he was obliged to work as a day laborer to get other corn.³ Where oxen are taken, a sum for their services cannot be

¹ *Gardner v. Field*, 1 Gray, 151; *Campbell v. Woodworth*, 26 Barb. 648; *Pozzoni v. Henderson*, 2 E. D. Smith, 146; *Trout v. Kennedy*, 47 Penn. St. R. 387; *Nightingale v. Scannell*, 18 Cal. 315.

² 17 Pick. 453.

³ *Sims v. Glazener*, 14 Ala. 695.

* In 20 N. Y. 499, the Court of Appeals, in reversing the case of *Campbell v. Woodworth*, 26 Barb. 648, held that the price the goods brought at auction was proper evidence on the question of damages, to be allowed such weight as the circumstances of the sale should entitle it to.

In *Whitehouse v. Atkinson*, 3 Car. & P. 344, which was an action by the assignees of a bankrupt against a sheriff who had sold the goods on execution. Lord Tenterden, Ch. J., said to the jury: "With respect to the damages, a plaintiff is not bound by the sum at which goods have been sold at auction. But where the plaintiff is an assignee who must have sold the goods if they had come to his hands before any sale by the sheriff, it often happens that the jury consider the sum at which they were actually sold at auction as a fair measure of damages."

Where in an action for trespass by which the plaintiff's crop was exposed and destroyed by cattle, the jury have given the highest price for which the crop could have been sold, the verdict will not be set aside on the ground of excessive damages (*Denby v. Hairston*, 1 Hawks. 315).

added to their value.¹ The measure of damages for unlawfully seizing and detaining a steamboat is the actual damage, irrespective of any question of profits or earnings.²*

§ 628. In case of the destruction of property, if it was of no intrinsic value, and was designed and used to insult and annoy the defendant, the plaintiff will only be entitled to recover the actual value of the materials destroyed. Where the plaintiff caused a picture which he had painted, and which he called "The Beauty and the Beast," to be placed on exhibition in Pall Mall, and the defendant having cut the picture in pieces, the plaintiff claimed the full value of the picture and compensation for the loss of the exhibition, the defendant was allowed to prove in mitigation of damages that the picture was a scandalous libel upon the defendant's brother and sister. Lord Ellenborough said: "If this picture was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts."

17. *Exemplary damages.*

§ 629. If the trespass be committed maliciously, and in a wanton and aggravated manner, and with the design to vex and harass the plaintiff, exemplary damages may be allowed.³† Where the defendant, at the time of committing

¹ Anthony v. Gilbert, 4 Blackf. 348.

² Callaway &c. Co. v. Clark, 32 Mo. 305.

³ Huntley v. Bacon, 15 Conn. 267; Linsley v. Bushnell, Ib. 225; Milburn v. Beach, 14 Mo. 104; McCullough v. Walton, 11 Ala. 492; Anthony v. Gilbert, 4 Blackf. 348; Wylie v. Smithmerman, 8 Ired. 236.

* The measure of damages for injury to property is not the cost of restoring it to its original condition where such cost exceeds the value of the actual damage sustained by the owner (Harvey v. Sides &c. Co. 1 Nev. 539).

† Where the injury is proved to have been committed maliciously, wantonly,

the offense, opened a chest belonging to the plaintiff, and made use of language in relation to the contents of it that wounded her feelings, it was held that this was proper to be considered in assessing the damages. "The abuse to the plaintiff, by searching her chest and indulging in improper remarks, at the time and in the manner mentioned, was an aggravation of the trespass, coetaneously existing with it, and serving to show the malice with which her legal rights were violated."¹ But the absence of any wrongful intent will prevent vindictive damages. Where, in an action of trespass for seizing personal property, the plaintiff's counsel admitted that the defendants had not been influenced by any malicious motives in making the seizure, and that they had not acted therein with any view or design of oppressing or injuring the plaintiff, it was held that such admission precluded the plaintiff from claiming any damages against the defendant by way of punishment or smart money, but that after such admission the plaintiff could recover only the actual damages sustained.² * In *Sinclair v. Tarbox*,³ which was an action of

to gratify revenge, from a spirit of ill-will and a desire to injure, or with the view of obtaining unlawfully and with a fraudulent intent, a benefit to the defendant, by means of the injury to the property of the plaintiff, these circumstances of aggravation may, with great propriety, be considered in fixing the remuneration to which the plaintiff is entitled" (*Huntington, J., in Merrills v. The Tariff Manf. Co.* 10 Conn. 384).

In *Kentucky*, in trespass for enticing away a slave, it was held that the jury might give smart money (*Tyson v. Ewing*, 3 J. J. Marsh. 185).

¹ *Treat v. Barber*, 7 Conn. 274, per Hosmer, Ch. J.

² *Hoyt v. Gelston*, 13 Johns. 141; *aff'd on error*, *Ib.* 561.

³ 2 N. Hamp. 135.

* In *Heath v. M'Inroy*, 6 Johns. 277, it was proved that the defendant took one of the horses from the plaintiff's team, although forbidden by the plaintiff. The defendant justified the taking by proving that it was done under an attachment at the suit of the defendant against a third person, the defendant claiming that the horse was the property of such third person. It appeared that the horse had previously belonged to the third person, who delivered him to the plaintiff as security for a debt for which an attachment had been issued by the plaintiff against such third person, but no trial had ever taken place. The judge at the circuit having refused to certify that the trespass was wilful and malicious, the plaintiff now moved that he should indorse his certificate on the record. The Supreme Court, in denying the motion, said: "The better construction of the statute seems to be, and such is the construction now given to it in England, that it rests in the discretion of the judge who tries the cause to determine, from the testimony, whether the trespass was wilful and malicious. The court will not, therefore, make any order in this case. If the court were now to give an opinion, we should not be inclined to consider every voluntary trespass *per se*,

trespass for taking and carrying away a sleigh, the defendant relied upon his innocence of wrongful intention. The court remarked that the intent of the party might affect the damages; and that as the defendant appeared not to have been actuated by any bad motive, nor to have sold or converted the sleigh to his own use, he should pay only the actual injury caused by its removal. So where a party caused property to be seized under an execution issued on a void judgment, he not suspecting its invalidity, and acting under the advice of counsel, it was held that a refusal to allow exemplary damages was proper.¹*

wilful and malicious. This appears too narrow a construction. The statute seems to have meant, by the words wilful and malicious, 'some act done *mala fide*, or with an intention to injure or vex the plaintiff, or with a consciousness of violating right.'

¹ Selden v. Cashman, 20 Cal. 56.

* It would seem to be a well settled rule in the English courts, in actions of trover and trespass *de bonis asportatis*, that when the taking is not wilful and the property is not materially injured, and is returned to the real owner, the plaintiff will, on payment of the costs, proceed at his peril as to future costs (Bucklin v. Beals, 38 Vt. 653). In Hart v. Skinner, 16 Vt. 138, Redfield, J., in delivering the opinion of the court, after reviewing the English authorities and conceding their correctness upon principle, said: "It is not very obvious, then, why the court should not have the same discretion here, in allowing or refusing costs, which is exercised by the courts in England. There it is every day's practice to pay money into court (which had not been previously tendered) under a rule that the plaintiff accept the same and discontinue his suit, or proceed at his peril as to costs. This sum paid into court is supposed always to cover the costs already accrued, and a specific amount of debt or damage."

In Bucklin v. Beals, *supra*, Wilson, J., in commenting upon Hart v. Skinner, said: "Our courts, upon equitable principles, have introduced the practice of allowing payment of the debt and costs already accrued in such cases, to be made into court; thereby placing the defendant, as to future costs, on the same ground as if he had seasonably made a tender of the same sum. I think the good sense of this practice is no less obvious in its application to some cases of torts; and it would seem, upon principle, that in actions of trover and trespass *de bonis asportatis*, when the taking is not wilful and the property is not essentially injured, the defendant should be allowed to surrender the property, and to pay the actual damage for the taking and detention of it into court, together with the costs of the action already accrued; and in case the plaintiff refused to accept the money paid into court, he must proceed at his peril, inasmuch that if at the trial he is nonsuited, or if the jury shall not give him a sum exceeding the money paid into court, he will be obliged to pay the costs of the action. The numerous actions of trover and trespass *de bonis asportatis* growing out of the sale and transfer of personal property, where the vendor had no title, and where by his false and fraudulent representations, or by some indications of ownership, the vendee was induced to make the purchase, where there was no intentional wrong on the part of the purchaser, and no real damage done by him, require that he should be relieved from the rigor of the rule applicable to cases of wilful and malicious trespass. The rule allowing such surrender of the property, and payment in the discretion of the court, is founded in

equity, which is 'the correction of that wherein the law (by reason of its universality) is deficient.' It goes upon the principle that when the defendant is ready and willing to pay, and places within the reach of the plaintiff a sum of money equal to the actual debt or damage recoverable by law, and the costs already accrued, the action ought not to be further prosecuted at the expense of the defendant."

Where the jury find part of the issue for the plaintiff, and a part for the defendant, a judgment erroneously entered by the plaintiff for himself on the entire issue will be amended. In trespass for breaking and entering a dwelling-house, and seizing and taking away divers goods and chattels there being, the defendant pleaded that the house was not the plaintiff's, nor the goods his goods. At the trial, the contest was as to the right to the goods. The jury found that the house and part of the goods belonged to the plaintiff. The plaintiff having entered the *postea* for himself, the court ruled that the issue as to the goods was divisible, and ordered the *postea* to be amended by entering it for the defendant as to those goods which were found not to be the property of the plaintiff (*Routledge v. Abbot*, 3 Nev. & P. 560; 8 Ad. & E. 592; 1 W. W. & H. 372).

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